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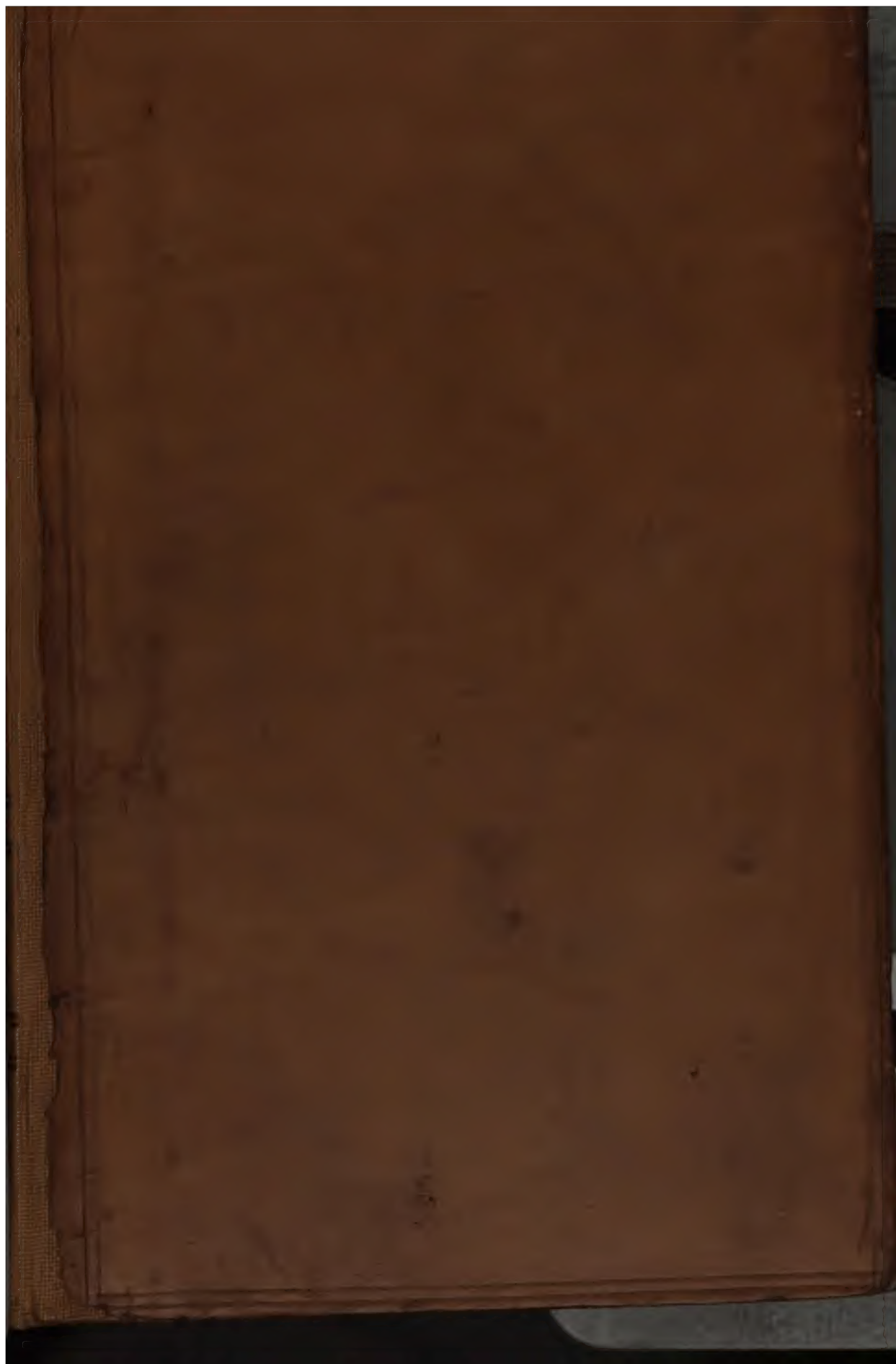
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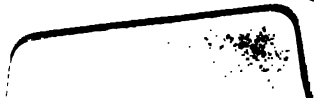


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**REPORTS OF CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**HIGH COURT OF CHANCERY.**



REPORTS OF CASES  
ARGUED AND DETERMINED  
IN THE  
HIGH COURT OF CHANCERY,  
DURING THE TIME OF  
LORD CHANCELLOR SUGDEN.

---

BY  
WILLIAM B. DRURY, AND ROBERT R. WARREN, Esqrs.,  
BARRISTERS AT LAW.

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**The Right Hon. Sir EDWARD BURTENSHAW SUGDEN, *Lord Chancellor.***

**The Right Hon. FRANCIS BLACKBURNE, *Master of the Rolls.***

**The Right Hon. THOMAS BERRY CUSACK SMITH, *Attorney-General.***

**RICHARD WILSON GREENE, Esq., *Solicitor-General.***



## MEMORANDA.

---

IN the Vacation after Trinity Term, 1842, The Honourable *John Leslie Foster*, one of the Judges of the Court of Common Pleas, departed this life, and shortly afterwards *Joseph Devonsher Jackson*, Esq., at that time Her Majesty's Solicitor-General, was appointed to the vacant seat on the Bench. About the same time *Thomas Berry Cusack Smith*, Esq., one of her Majesty's Counsel, was appointed to the office of Solicitor-General.

Subsequently, in the same Vacation, the Right Honourable Sir *Michael O'Loghlen*, Bart., departed this life, and shortly afterwards the Right Honourable *Francis Blackburne*, then Her Majesty's Attorney-General, was promoted to the office of Master of the Rolls, and took his seat on the first day of the following Michaelmas Term. *Thomas Berry Cusack Smith*, Her Majesty's Solicitor-General, was appointed Attorney-General ; and *Richard Wilson Greene*, Esq., Her Majesty's First Serjeant at Law, succeeded to the office of Solicitor-General.

In Michaelmas Term, 1842, *Joseph Stock*, Esq., was appointed Her Majesty's First Serjeant ; *Richard Benson Warren*, Esq., Second Serjeant ; and *Richard Keatinge*, Esq., Third Serjeant.

In the vacation after Trinity Term, 1842, Her Majesty was pleased to appoint *George Tomb* and *James Whiteside*, Esqrs., to be of Her Counsel learned in the Law ; and on the first day of Michaelmas Term, 1842, the following gentlemen were appointed to the same dignity, namely *James Sheil*, *Theobald M'Kenna*, *Mountiford Longfield*, and *Francis M'Donagh*, Esqrs.





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#### CORRIGENDA.

Page 289, line 20, for have, read lease.  
— 339, — 12, for were, read was.  
— 386, — 12, for warrant, read current.  
— 406, — 18, for this, read the.

# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## HIGH COURT OF CHANCERY.

SHEPPARD *v.* DOOLAN.

1842.

Nov. 3, 6, 12.

BY indenture of lease bearing date the 21st of July, 1777, *Ralph Smith* demised the lands of Skehanna to *John Short*. The *habendum* of this lease was in the words following, viz. :

The *habendum* of a lease was in these terms :  
“ To have, &c., to *T. S.*, his heirs, &c., for and during the natural life and lives of *J. B.*, *W. B.*, and *E. B.*, or the longest liver of them, or whatever life or lives shall for ever or hereafter be nominated or appointed, added or inserted, on the back of this indenture, or a label affixed thereunto, paying

“ To have and to hold the said demised premises with the rights, members, and appurtenances thereunto belonging, or in anywise appertaining, unto the said *Thomas Short*, his heirs, executors, administrators, and assigns, from the 25th of March last past, for and during the natural life and lives of *Joseph Burton*, *William Burton*, and *Ekizabeth Burton*, children of the late *Joseph Burton* of *Shinrone*, deceased, or the longest liver of them, or what-

ing for each and every life so renewed, a pepper-corn, if demanded, yielding, &c.” The lease did not contain any technical covenant for renewal :—

*Semble*, the *habendum* amounted to a covenant for perpetual renewal.

Where the purchaser of an interest sold under the decree of this Court, thereby acquires information as to a supposed defect in the title to that interest, and improperly avails himself of that information by purchasing the estate of the person, who alone could have taken advantage of the supposed defect ; such purchaser will not be allowed the benefit of the general rule as to doubtful titles.

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*ever life or lives shall for ever, or hereafter, be nominated or appointed, added or inserted, on the back of this indenture, or a label affixed thereunto, paying for each and every life so renewed a pepper-corn if demanded, yielding and paying therefrom and thereout yearly and every year during the said term unto the said Ralph Smith, his heirs, &c., the yearly rent of, &c."*

The lease contained the usual clauses of distress and re-entry, and covenants for payment of the reserved rent, for the repair and preservation of improvements, and for quiet enjoyment; but it did not contain any formal covenant for renewal.

In 1836, *Joseph* and *Elizabeth Burton* having died, and the estates of the lessor and lessee in the indenture of 1777 having become vested in *Ralph Smith* the younger and *Thomas Doolan*, respectively, an indenture of renewal, bearing date the 26th of October, 1836, was made between the said *Ralph Smith* and *Thomas Doolan*.

This deed recited, that by indenture of release, bearing date the 21st of July, 1777, the lands of Skehanna had been demised to *Thomas Short*, "to hold to him the said *Thomas Short*, his heirs and assigns, for the lives and life of *Joseph Burton*, *William Burton*, and *Elizabeth Burton* therein named, and all and every such further and other life and lives as should for ever thereafter be added thereto, pursuant to the covenant for perpetual renewal therein contained;" and witnessed, "that the said *Ralph Smith*, in pursuance and performance of the aforesaid covenant for perpetual renewal, and in consideration, &c., hath demised, &c., to hold all and singular, the said lands and premises,

with their appurtenances as fully as the same were demised in and by the said in part recited indenture of the 21st of July, 1777, unto the said *Thomas Doolan*, his heirs and assigns, for and during the lives, &c. ; and for and during the lives of all such other person and persons as shall for ever thereafter be added to the time and term of said original and last-mentioned demise, pursuant to the covenant for perpetual renewal therein contained, &c."

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Under the decree in the present suit, the estate of *Thomas Doolan* in these lands was sold. In the particulars of sale, it was described as a freehold estate held for three lives with a covenant for perpetual renewal. The purchaser objected to the title, and the usual reference having been directed, the Master made his report, finding, that the lease of the 21st of July, 1777, did not convey a freehold estate for a term of three lives, with a covenant for perpetual renewal to the lessee therein, and that such an interest could not be conveyed to the purchaser by the Defendant *Doolan*. To this report the Plaintiff excepted, and the case having come on to be heard before the Master of the Rolls, he overruled the exceptions.

The arguments at the Rolls, and the judgment of his Honor, are reported in Messrs. *Flanagan & Kelly's* Reports, page 598.

From this decision the Plaintiff appealed, and the case now came on to be heard before the Lord Chancellor.

Mr. *Brooke* and Mr. *Monahan* for the Plaintiff.

Argument.

The language of the *habendum* in the original lease clearly expresses an agreement for the conveyance of a perpetual in-

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terest, and this agreement is under seal. This is sufficient to constitute a covenant, for it is settled upon the authorities, that technical words are not necessary; "any words, which show the party's agreement to the performance of a future act, being effectual for that purpose;" *Sheppard's Touchstone*(a), *Stevenson's Case*(b), *Pordage v. Cole*(c), *Furnival v. Crew*(d). The terms of this demise, therefore, although not in the form of a covenant, are in effect and in a legal point of view, equivalent to a covenant for a renewal. The question then arises, what is the extent of the right to renewal? In order to collect the intention of the parties, the Court is at liberty to consider any expressions which are used in the deed, *Taylor v. Pollard*(e). What then is the obvious signification of the words "for ever or hereafter?"—"or" is insensible, unless construed to mean "and"—substituting, then, for "or" the word "and," as may be done in construing deeds as well as wills(f), the expressions prove beyond all doubt, that the parties contemplated under this deed a future nomination and addition of *cestui que vies* in perpetuity. In *Ball v. Lord Downshire*(g), the covenant clearly was not one for perpetual renewal; yet as the parties had acted as if the covenant did extend to confer a right to perpetual renewals, Lord *Manners* said, that although the instrument could not be construed by the acts of the parties, yet they afforded a presumption as to what was the agreement between the parties; and accordingly he retained the bill in that case, with liberty to bring an action at law upon the covenant. Here the deed

(a) Page 161.

(b) 1 Leon. 324.

(c) 1 Saund. 319.

(d) 3 Atk. 83.

(e) Lyne on Leases for Lives, App. p. lxii.

(f) See *White v. Supple*, ante, vol. ii. p. 471.

(g) Lyne, App. p. lviii.

of 1836 shows, that the parties considered the lease of 1777 as conferring a perpetual interest.

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[THE LORD CHANCELLOR:—The question here is altogether one of construction, and has nothing to do with any presumption.]

The doctrine of doubtful titles relates to difficulties resulting from an uncertain state of facts, not to questions of law. To hold, that the unfavourable opinions of the Master and of his Honor the Master of the Rolls, created such a substantive objection to this title, as to render it a doubtful title, would virtually deprive this Court of its appellate jurisdiction.

The *Attorney-General* and Mr. *De Moleyns* for the purchaser.

In all the cases in which it has been held, that a lease *pur auter vie* conferred a perpetual interest, although it did not contain an express covenant for perpetual renewal, there have been expressions indicating the intention of the parties, which in this instrument are wanting. Here there is no recital of an intention to grant a perpetual interest; there is no covenant to grant any future interest whatever. The only passage, on which any reliance is placed, is of the most ambiguous character; its terms are all in the disjunctive, it does not even contain a statement as to the party, by whom the future *cestui que vies* are to be nominated. The clause may be fully explained thus, by supposing, that in the event of the parties agreeing to a renewal, it was intended that the renewal should be granted by an indorsement, without the execution of a formal indenture. Is this then such a title as the Court will compel a purchaser to accept? No argu-

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ment can be derived from acts of the parties subsequent to the execution of the lease. The intention of the parties must be expressed without ambiguity in the instrument itself. The covenant must be clearly expressed; *Baynham v. Guy's Hospital*(a), *Moore v. Foley*(b), *Iggulden v. May*(c). In the late case of *Smyth v. Nangle*(d), an inquiry was made, as to the final result of *Ball v. Lord Downshire*, and it was ascertained, that the bill was dismissed with costs; and in that case of *Smyth v. Nangle*, the bill, which was filed for the purpose of obtaining a renewal, was dismissed, although there had been successive renewals from a remote period. In *Broune v. Tighe*(e), Lord Brougham says, "that nothing is to be supplied by intendment."

In *Marlow v. Smith*(f), Sir Joseph Jekyll says, "there being the opinion of learned men against the title, I will not, nor do I think it reasonable, that a Court of Equity should compel the purchaser to accept the purchase." It is not contended here, that the opinion of the officer, and the decision of the Master of the Rolls, constitute a conclusive objection to the title; but the value of those opinions is certainly not diminished by the circumstance, that they were judicially expressed. *Shepherd v. Kentley*(g) and *Wallace v. Patten*(h) were also referred to.

At the conclusion of the argument, counsel for the Appellant stated, that subsequently to the sale under the decree in this cause, the purchaser had become the head landlord of the premises so sold, and entitled to the reversion immediately

(a) 3 Ves. 225.

(b) 6 Ves. 232.

(c) 9 Ves. 325; 7 East, 237.

(d) West P. C. 184.

(e) 8 Blyth, 220.

(f) 2 P. Wms. 201.

(g) 4 Tyrw. 571.

(h) 1 Ir. Eq. Rep. 326.

expectant upon the lease of the 21st of July, 1777; and further stated, that this reversion had been sold by the former owner, as if subject to a covenant for the perpetual renewal of the lease of 1777, but bought by the purchaser, after he had become aware of the supposed defect in the title to the interest sold under the decree.

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*Argument.*

Counsel for the purchaser stated, that they had not received any instructions upon the subject; that they were ignorant whether the fact was as alleged at the other side; and insisted that there was no evidence of the matter before the Court.

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THE LORD CHANCELLOR:—

*Judgment.*

I shall not, in this case, feel the slightest difficulty from the rule as to doubtful titles, for if there be really a right of perpetual renewal, the conduct of the purchaser has relieved me from all difficulty. He bought a subject represented in the particulars of sale as a lease for lives, with a covenant for perpetual renewal, and there have been, in point of fact, renewals from time to time, the landlord as well as the tenant concurring in that, as the true construction: the purchaser then, behind the back of the Court, buys of the landlord the reversionary estate, which was supposed to be thus bound by a covenant for perpetual renewal. He now objects to the title as doubtful, and insists, that a Court of Equity cannot compel him to accept it. I could not give this purchaser the benefit of the general rule as to doubtful titles, for he has obtained an interest, which puts it in his own power at once to remove all doubt upon the subject. By coming into this Court he acquired means of information which he has improperly



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taken advantage of, and he now fills the double character of owner of the reversion and purchaser of the lease.

With respect to the common cases of doubtful title, I cannot agree with the proposition, that an unfavourable decision in the Court of inferior jurisdiction renders the title doubtful. The Judge of the superior court would still be bound to exercise his own discretion and decide according to his own judgment. I have myself often argued at the bar in support of the proposition, but always without success; for although I have urged, that no Judge could consider a title to be free from doubt, when one or two Judges, competent to decide the question, had pronounced it to be defective, I have been ever met by this answer, that to adopt such a doctrine would be in effect to leave the ultimate decision of the question to the Court below, while the law provides an appeal to the Court above.

I will not however part with this case until I am fully informed of the circumstances attending the purchase of the reversion, for they may have been such, as would induce me at once to say (whether the construction of this instrument be or be not doubtful), that the purchaser has now no right to object to the title. I may find myself at liberty to say to him, “ you have yourself removed all grounds of objection; you have behind the back of the Court bought up the interest of the person, who had the means of giving validity to the title. There was indeed a difficulty, but you have thought proper to purchase an interest, which enables you to remove the impediments, and therefore you are bound to accept the title.”

With regard to the question of law, as the terms of the

lease were at first stated, without the pepper-corn fine (slight as this circumstance may seem), my impression was, that it would be extremely difficult to say there was a covenant for perpetual renewal. There is not much doubt as to what words are sufficient to constitute a covenant. Any writing under seal, which expresses an agreement between the parties, may amount to a covenant. But none of the cases, which have been cited, resemble that before the Court. The decision in *Wallace v. Patten*(a) was grounded upon words not contained in this lease. The case of *Taylor v. Pollard*, reported in the Appendix to Mr. *Lyne's* book, is very unlike the present; there I find this clause, "to hold, &c., and for and during the natural life and lives of the late King *George the Third*, the said *Dillon Pollard* and *Charles Hampson*, and for and during such other lives, as by virtue of the covenants for perpetual renewal hereinafter contained, shall from time to time, successively and for ever hereafter, be added:" and this is followed by a covenant for renewal, not indeed in terms for perpetual renewal, but which being accompanied by a covenant for quiet enjoyment for ever, amounted to a covenant for perpetual renewal. By the *habendum*, and by the second covenant, the parties themselves explained the meaning of the covenant for renewal: the two covenants amounted to a covenant for perpetual renewal; that case was, I think, properly decided, but it does not resolve the difficulty here, for I do not find in this instrument any statement, which aids the construction. There is nothing inconsistent in the words of the *habendum*.

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Judgment.

It is said that if the words "or hereafter" were omitted, there would be clearly a covenant for perpetual renewal.

(a) 1 Ir. Eq. Rep. 338.

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I confess I do not feel the difficulty so much insisted on as to the word "or." It is a common mode of expression substituting the disjunctive particle. The clause is right in substance, and there is nothing wrong in the expression that it does not follow, that any lives would ever be nominated or that lives would for ever be nominated. Where the clause is nominal, and there is nothing to show that it was intended that the lessor should have an option, it would be hard to say the interest was not to be perpetual.

What then is the effect of the words "or hereafter"? Are they sufficient to cut down the general meaning of the clause "shall for ever or hereafter?" that is, I think, "shall for ever or at all times, when new lives are nominated or renewed, &c." This is a submission to be bound on the terms of the grantor, and what has been said at the bar is that while the lessor in such demises is bound to renew, there is seldom a corresponding obligation imposed on the lessee to accept a renewal.

If the parties choose, I will send a case to a Court of Law, for its opinion whether the *habendum* in this lease amounts to a covenant for perpetual renewal at a peppercorn fine: and then, when the case comes back, I shall have to consider the effect of the purchase of the reversion, and in that event, I shall probably seek the aid of the Master of the Rolls, in order to decide upon the effect of the purchase of the reversion behind the back of the Court.

The case stood over until the facts connected with the purchase should be fully ascertained. Ultimately, with the approbation of the Lord Chancellor, the purchaser accepted the title to the lease, and was allowed his costs.

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**THIS** was an interpleader suit. The Plaintiffs represented the Globe Insurance Company. The bill, which was filed on the 11th of May, 1838, stated, that the Rev. *Edward Jeffries* had on the 12th of February, 1808, effected an insurance with the Globe Insurance Company upon the life of the Rev. *William Ashe*, for the sum of 1700*l.*: and that on the 28th of February, in the same year, the said *William Ashe* himself effected an insurance upon his own life with the same Company, for the sum of 425*l.*

The bill then stated, that by a certain indenture, bearing date the 27th of September, 1808, and made between the said *William Ashe* of the one part, and the said *Edward Jeffries* of the other part, reciting the policy of insurance for 1700*l.*, and that the same had been obtained by *Jeffries* for the benefit of the children of *William Ashe*, and for the other purposes mentioned in a certain deed bearing same date therewith, and made between the said *William Ashe*, *Elizabeth Ashe* his wife, and *Edward Jeffries*: and reciting further the policy of 425*l.*, effected by the said *William Ashe* in his own name: and reciting further, that *Ashe* was entitled to the tithes of the vicarages of Kilfer-

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*A.* effected two policies of insurance upon his life, one in his own name for 425*l.*; and the other for 1700*l.* in the name of *J.* In the year 1808, he assigned by deed these two policies to *J.* upon certain trusts, which were declared in a second deed of the same date, and which was referred to in the deed of assignment: These trusts were, first to pay certain debts of *A.*, then to reimburse *J.* advances which he from time to time had made to *A.*, and subject thereto, to hold the residue to form a fund for the daughters of *A.*, in such shares as he should appoint.

Upon the death of *A.* the amount of the policies was

claimed by *L.* the executor of *J.*, and at the same time notices were served upon the Company, by the administrator of *A.*, by two of his sons, by one of his daughters, and by the husband of another daughter, cautioning the Company against paying over the amount of the policies to *L.*

*Held*, upon a bill of interpleader, thereupon filed by the Company, that as to the policy of 1700*l.*, there was no case of interpleader established; for that although there was no declaration in the deed of 1808, that the receipt of the trustee should be a discharge, yet that the nature of the trusts of the deed was sufficient to absolve the Company from seeing to the performance of the trusts, or the application of the money.

*Held*, also, that with regard to the policy of 425*l.*, the suit was maintainable, by reason of the claim of the administrator of *A.*; but that as it appeared, that within a few days after the bill was filed, a second notice was served by the same party, withdrawing his demand, the Plaintiff was not justified in persisting any further in the suit, and ought to have discontinued.

Disposition of the costs of the different parties.

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gus and Grange, in the county of Limerick ; and that he was desirous of making over same to the said *Edward Jeffries*, as well for the purpose of keeping up the said two policies of insurance, as also for the other objects expressed in the other deed bearing even date therewith : the said *William Ashe* assigned and made over unto the said *Edward Jeffries*, as well the aforesaid policies of insurance, as the tithes of the said vicarages, during the incumbency of the said *William Ashe*, for the purpose of keeping up the said policies, as also for the several uses and purposes in the said deed of even date expressed and declared.

The bill then stated this deed of even date, made between the said *William Ashe* and *Elizabeth* his wife, of the one part, and the said *Edward Jeffries* of the other part, wherein after reciting certain articles of the 23rd of December, 1784, executed on the occasion of the marriage of *William Ashe* and *Elizabeth* his wife, whereby certain bonds and other personal property, constituting the fortune of the said *Elizabeth*, were thereupon vested in the Rev. *Thomas Locke* and the said *Edward Jeffries*, upon certain trusts for the said *William Ashe* and *Elizabeth* his intended wife : and also that the said *William Ashe* was entitled to certain freehold and leasehold properties, which by the said deed were conveyed to the said *Edward Jeffries*, upon certain trusts therein contained ; and further reciting, that the said *William Ashe* was indebted to several persons, in different sums of money, to a considerable amount, which he was not then in a capacity to pay, and that *Edward Jeffries* had not only joined him in different securities to several persons to a very large amount, but had also advanced large sums of money to satisfy some of the creditors : and further reciting, that the said *William Ashe* had six daugh-

ers, for whom he was minded to secure a further provision : the said deed witnessed, that for the purpose of paying off and discharging the said debts, and satisfying the different creditors of the said *William Ashe*, and of reimbursing the said *Edward Jeffries*, not only such sums of money as he had already paid, but also such sums as he should thereafter pay for the said *William Ashe*, and for exonerating the said *Edward Jeffries* from and against all manner of costs and damages, which he might thereafter sustain : and in the next place for the purpose of providing a provision for the daughters of the said *William Ashe* and *Elizabeth* his wife, the said *William Ashe* assigned and made over unto the said *Edward Jeffries*, the said freehold and leasehold property, the said personal property belonging to the said *Elizabeth Ashe*, and the two policies of insurance, upon trust to pay and discharge the debts due by the said *William Ashe*, and to indemnify the said *Edward Jeffries* against all such sums as he had already paid or might thereafter pay on such account out of his own property. And as to the residue upon trust for the daughters of the said *William Ashe* and *Elizabeth* his wife, to be disposed of amongst them in such shares and proportions, and at such time or times, as the said *William Ashe*, or the said *Elizabeth Ashe*, in case she survived him, should by deed or will appoint, and for want of such appointment, share and share alike.

The bill then stated, that the said *Edward Jeffries* died sometime in the year 1817, having by his will appointed executors, of whom the Rev. *Thomas Locke* was the survivor ; and that the said *William Ashe* died in 1836, having made and published his last will and testament in writing, wherein after reciting the deed of 1808, and the insurances

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on his life, he declared his will to be, that when the executors of the said *Edward Jeffries* had effected the purposes intended by said deed of conveyance and assignment, which was for the payment of his debts, his daughter *Elizabeth Ashe*, then unmarried, should have a sum of 1200*l.*, being a share equal to that which her sister *Mary Anne Sullivan* had received ; and after several other bequests, he bequeathed all his personal property to his wife, and appointed *Robert Carte* his executor, who having renounced, administration with the will annexed was granted on the 14th of February, 1837, to *Henry Ashe*.

The bill then stated, that upon the death of *William Ashe*, the said *Thomas Locke*, the executor of the said *Edward Jeffries*, claimed from the Company payment of the said two policies, of 1700*l.* and 425*l.*, alleging, that as to the former it had been lost : the bill however stated, that this policy had not been lost, but mortgaged by *Locke* to *Edward Tierney*, by deed of the 2nd of June, 1827, to secure a sum of 404*l.*

The bill then stated, that while the claim of *Locke* was under consideration, a notice was served on the Company, on the part of Major *James Sullivan*, the husband of the said *Mary Anne Sullivan*, one of the daughters of the said *William Ashe*, requiring them to retain the amount of the policy of 425*l.*, inasmuch as he had a claim thereupon by virtue of his marriage settlement.

The bill also stated, that the Company had received notices from *Edward Ashe* and *William Ashe*, two of the sons of the said *William Ashe*, alleging that they were interested in the said policies of insurance, and requiring them

to retain the same : and also from *Henry Ashe*, as the administrator of *William Ashe*, who served a written notice, accompanied by a copy of the letters of administration to him, and threatened, in case of a refusal on the part of the Company to pay the amount of the policies to him, to proceed forthwith for the recovery thereof.

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The bill further stated, that neither of the deeds of the 27th of September, 1808, contained any clause or covenant declaring that the receipt of the said *Edward Jeffries* should be a good and valid discharge for the payment of the sums secured by the said policies of insurance ; but that nevertheless, the Company offered to pay the amount, upon getting a release from the said *Thomas Locke*, as executor of *Jeffries*, from *Tierney*, the mortgagor, and from *Henry Ashe*, the administrator of *William Ashe*, and from *Mary Anne Sullivan* and *Elizabeth Ashe* ; but that *Henry Ashe*, and *Mary Anne Sullivan*, and *Elizabeth Ashe*, refused to concur in the release, or to assent to the said Company paying over the amount of the policies to *Locke* or *Tierney*.

The bill then charged, that under the above circumstances, the Company were obliged to file the present bill, finding that the parties would not come to any amicable arrangement between themselves ; but that, on the contrary, each party declared that they would hold the Company accountable, and inasmuch as *Locke* had actually commenced proceedings at law against the Plaintiffs.

The Defendants in the suit were *Locke*, *Tierney*, and his trustee *John L. Locke*, *Henry Ashe*, and his two brothers, *Edward* and *William*, *James Sullivan* and *Mary Anne* his wife, and *Elizabeth Ashe*.



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*Thomas Locke* in his answer stated, that he and one *Edward Carte* (who was since dead), as the executors of *Edward Jeffries*, had in the year 1818, filed their bill in this Court, against *William Ashe* and *Elizabeth* his wife, *Sullivan* and wife, and others ; setting forth the deeds of 1808, and the advances made by *Jeffries* in his life-time to *William Ashe*, and that there were not sufficient funds to reimburse *Jeffries* ; and praying an account of the said trust dealings, and that *William Ashe* might be obliged to indemnify the estate of the said *Edward Jeffries* ; and that the said policies of insurance might be kept on foot out of the trust funds, and appropriated in discharge of the demands of the executors. That in the month of May, 1821, a decree was pronounced, directing an account on foot of said trust dealings ; and that in the month of December, in the same year, a report was made under the said decree, finding that there was a balance of 6817*l.* 0*s.* 7½*d.* due to the assets of *Jeffries* on foot of the said trust dealings. *Locke* in his answer further stated, that same was still due and unpaid. That with respect to the policy of 1700*l.*, he and *Tierney*, the mortgagee, were the only persons legally or equitably entitled ; and that so far was *Tierney* from ever interposing any obstacle in the way of the Company's paying the same to *Locke*, that he repeatedly offered to join in any release that might be required ; and he submitted, that he, as the executor of the said *Edward Jeffries*, was the person legally entitled to receive the amount of the said policy, and was fully competent to give an effectual discharge to the Company for same ; and that with regard to the policy of 425*l.*, *Henry Ashe*, the administrator of his father, had, in point of fact, withdrawn his claim.

With respect to the claim of *Sullivan* and wife, it arose

out of the settlement executed on their marriage in 1812, which after reciting the deeds of September, 1808, provided, that any surplus of the funds thereby vested in *Jeffries*, should be divided between the daughters of *William Ashe*, of whom *Mrs. Sullivan* was one, in the shares therein particularly mentioned.

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There was no dispute as to the claim of *Tierney*, who was a mortgagee of the policy of 1700*l.* by deed of the 2nd of June, 1827, to secure an advance of 404*l.* to *Thomas Locke*.

The notice, which was served by *Henry Ashe* on Mr. *Denis Mahony*, the agent of the Company, on the 8th of May, 1838, was in the following terms: "Take notice, that as administrator to my father, the Reverend *William Ashe*, late of, &c., a copy of whose will, and the letters of administration thereon, I herewith send, I require you as agent to the Globe Insurance Company, to pay me the amount of policy No. 1471, for the sum of 1700*l.*, and policy No. 1478, for the sum of 425*l.*, which insurances were effected by the deceased for the benefit of his family, and the premiums on which have been paid out of his property; and should you refuse to comply or neglect to do so, I will proceed in such manner as I may be advised for the recovery of the same."

On the 24th of May, a notice was served on the Company by *Henry Ashe*, withdrawing his claim to the two policies of insurance, and the bill was subsequently taken as confessed against him, and also against his sister, the Defendant *Elizabeth Ashe*.

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*Statement.*

Upon the filing of the bill, the Plaintiffs paid into Court the amount of both policies, and obtained an injunction restraining *Locke* from proceeding in the action at law. The cause now came on to be heard.

*Argument.*

Mr. Serjeant *Warren*, Mr. *Brewster*, and Mr. *M'Mechan* for the Plaintiffs.

The Plaintiffs were compelled to institute the present suit, by reason of the conflicting claims of the different Defendants. The deed of 1808, whereby the policies were assigned to *Jeffries*, does not contain any clause enabling the trustee to give receipts to the Company; and the Company having notice of the trusts, would be therefore bound to see to the application of the money and the performance of the trusts: the case of *Horn v. Horn(a)* shows, that even in the case of the purchase of a real estate of a trader, sold by his executor and devisee before the debts were paid, nevertheless the purchaser was bound, notwithstanding the Statute, to see that the purchase-money was applied in payment of the legacies. It is true, that the conflict here is between legal and equitable titles; but though the mode of relief is different, the subject is the same; the claims of the parties are opposed, and an action at law, or a suit in Equity, would be equally harassing to the Plaintiffs; *Paris v. Gilham(b)*, *Morgan v. Marsack(c)*. It is sufficient, if the debtor can show, that the credit or has given a colour of title to a third person, and that he is in danger of being molested by conflict-

(a) 2 Sim. &amp; S. 448.

(c) 2 Mer. 107.

(b) Coop. 56.

ing rights. In *The East India Company v. Edwards*(a), Sir *William Grant* says, “*Edwards* had by his act given a colour of title to another person, and until that was disposed of, could not insist on payment to himself:” *Wright v. Ward*(b) is a still stronger case: there the executors of a party to whom a bond was due, represented to the obligor, that the amount of the bond should be appropriated in payment of a legacy bequeathed by the testator, and the Court held, that this was such a dealing with the debt as gave the obligor, upon a controversy subsequently between the legatee and the executor, a right to sustain a bill of interpleader. In the present case the Plaintiffs received formal notices from all the parties, who were interested in the proceeds of the policies, cautioning them against payment. As to the smaller policy, the right of *Locke*, the trustee, was disputed, and by *Henry Ashe*, the administrator of the deceased, who admittedly had the legal right. With regard to the policy of 1700*l.*, there were circumstances connected with it calculated to excite suspicion; the bill charges, that *Locke* told the Company’s agent that it was lost; this, it is true, is to some extent denied by *Locke* in his answer; but it is quite clear that he concealed from the Company the fact of his having mortgaged it to *Tierney*. Under all the circumstances of the case, the Plaintiffs submit, that they have shown upon this record a clear case of interpleader, and that they are entitled to have their costs of the suit out of the fund in controversy, according to the principle of *Campbell v. Solomans*(c), and *Farebrother v. Prattent*(d).

1842.  
GLYNN  
v.  
LOCKE.  
Argument.

(a) 18 Ves. 376.  
(b) 4 Russ. 215.

(c) 1 Sim. & S. 462.  
(d) 5 Price, 303; Daniel, 64, 70.

1842.

GLYNN

v.

LOCKE.

*Argument.*

Mr. *Martley* and Mr. *Pakenham*, for the Defendant *Locke*, contended, that there was no case of interpleader established. The suit has been occasioned by the supposed liability of the Company to see to the performance of the trust: in this the Plaintiffs are mistaken: no such duty devolves upon them: the first trust is for the payment of the debts of *William Ashe*, which were unascertained, and which, in point of fact, exhaust the entire fund. As the case now stands, it is admitted, that the amount of both the policies is to be paid to the Defendant *Locke*. The legal title to the policy for 1700*l.* was alone vested in him, as the representative of *Jeffries* under the deed of 1808, and *Tierney* the mortgagee was on all occasions willing, and had offered, to join in a release to the Company; with regard to the policy of 425*l.*, from the moment that *Henry Ashe* withdrew his claim, which he did within a few days after the bill was filed, all conflict with respect to that policy was at an end, and the Company was thenceforth not justified in persisting with the suit.

The *Solicitor-General* and Mr. *Cheyne* for *Tierney*, the mortgagee, and his trustee, *John L. Locke*.

Mr. *Kane* and Mr. *J. T. Green* for Major *Sullivan* and his wife, and for *Elizabeth Ashe*.

Nov. 4.

*Judgment.*

THE LORD CHANCELLOR:—

I do not apprehend that there is any real difficulty in this case. The authorities which have been referred to distinctly show, that to support a bill of interpleader, there must be a conflict between the Defendants. In the case

of *The East India Company v. Edwards(a)*, the Plaintiffs had entered into contract with one of the Defendants, *Edwards*, and he had subsequently assigned the contract, and the benefit thereof, to another of the Defendants, *Dickenson*: but it was insisted, that the assignment was invalid. *Edwards*, by his answer, impeached the assignment; and the Court was of opinion, that the assignor, having given a color of title to the assignee, could not insist on payment of the sum stipulated for by the contract, until the claim of the assignee was disposed of. There was there a clear conflict, and consequently the case was a proper one for a bill of interpleader.

1842.  
GLYNN  
v.  
LOCKE.  
Judgment.

In the other case of *Wright v. Ward(b)*, a testator bequeathed the interest of a certain legacy to one for life, and after the legatee's death to distribute the principal among certain persons specified in his will. The executors and trustees of the legacy having agreed that a bond debt, which was due to the testator, of equal amount with the legacy, should be appropriated to the payment of the legacy, communicated the arrangement with the obligor, and directed him accordingly to pay the interest of the bond to the legatee. This arrangement was acted on for several years: subsequently the surviving trustee of the legacy gave notice to the obligor, not to pay the money to the executors; and the executors commenced an action on the bond against the obligor, whereupon he filed a bill of interpleader. The case came first before the Vice-Chancellor, upon a demurrer filed by the executors, and he thought that it was not a proper case for interpleader, and allowed the demurrer; but on appeal, that order was reversed, the Lord

(a) 18 Ves. 376.

(b) 4 Russ. 215.

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 GLYNN  
 v.  
 LOCKE.  
 Judgment.

Chancellor holding, that the appropriation amounted to an assignment, and that therefore there was a conflict. In each of these cases different persons claimed the same subject : in such cases an interpleader bill can be maintained.

The present case is altogether of a different description. Mr. *Jeffries* effected an insurance of 1700*l.* upon the life of Mr. *Ashe*, which was understood to be for the benefit of *Ashe's* family. Mr. *Ashe*, the party whose life was insured, assigned the policy by a separate deed of the 27th of September, 1808, to *Jeffries*, the person who had effected the insurance, upon certain trusts, which were declared by another deed of similar date, and to which deed the former one expressly referred. Now the intention of the parties is quite plain, although it has not been executed in a conveyancer-like manner, viz., to render it unnecessary for the Company to inquire further. This contemporaneous deed was a family deed : it provided for the payment of the debts of the person whose life was assured, and for the repayment to the party, who had effected the policy, of the sums advanced by him, or which he might advance, for payment of the debts ; and after satisfaction of these obligations, a trust was declared for the different members of the family of the assured. The objection, which was made on the part of the Company, to the claim of the person who had the legal right, and the first equitable right, was that there was no declaration that the receipt of that person should be a discharge. But this was not necessary ; for the nature of the trusts of the deed is sufficient to absolve the Company from the necessity of seeing to the application of the money. Were I to decide this point in favour of the Company, and hold this to be a proper case for a bill of interpleader, I could not lay down a rule more mischievous in its tendency

to companies in general. It would amount to a decision, that in all cases a party paying money to a trustee is bound to see to its application, and consequently to the execution of the trusts of the deeds, however complicated. But no such rule exists. I hold, that the intervention of the person who has the legal right, and who was bound to see to the distribution of the fund according to the trusts of the deed, and who was introduced for that express purpose, was sufficient to protect the Company. I am clearly of opinion, that the Company was not bound to see to the application of this money, and therefore had no right to call for the execution of the trusts of the deed. In that view, therefore, the bill is wrong, so far as concerns the policy for 1700*l*.

1842.  
 GLYNN  
 v.  
 LOCKE.  
 Judgment.

As far as regards the policy for 425*l*. the case stands on different grounds. That policy was effected by *William Ashe* himself, and therefore the person, who had the legal right to recover, was his personal representative, *Henry Ashe*, who unfortunately insisted upon the Company paying to him the amount of both the policies. The notice, however, of the 8th of May shows, that he was acting under a misapprehension of his rights, but nevertheless claiming for the general benefit of the family. I do not feel at liberty to say, that this is not a case for interpleader, for here there was a conflict. *Henry Ashe*, who unquestionably had the legal right as to the smaller sum, and to some extent an equitable right, insisted upon the money being paid to him. I may observe that it is quite settled, that the person who is liable to pay the money, need not wait until the action is brought. *Locke*, as the representative of *Jeffries*, the party to whom the assignment had been made, required the payment to be made to him. Here there was a clear case



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---

Judgment.

of conflict. The parties were not claiming under each other, but adversely. As far, therefore, as the 425*l.* is concerned, I think the bill is properly framed, and the Plaintiffs are entitled to maintain it.

The only difficulty which remains is, what am I to do about the costs? In interpleader suits, the Plaintiff, if right, gets his costs out of the fund; and the Defendant, who is wrong, and who consequently may be supposed to have caused the suit, may be compelled to pay the costs(*a*). In the present case the Plaintiffs are partly right and partly wrong, and hence a difficulty arises. What I propose doing is this, so far as relates to the policy for 1700*l.*, I dismiss the bill with costs, as against the Defendants *Thomas Locke, Edward Tierney, and John L. Locke*; but without costs against the other Defendants, who in reality were the cause of the filing of the bill. As to so much of the bill as relates to the policy for 425*l.*, I think that the Plaintiffs are entitled to their costs up to the service of the notice of *Henry Ashe*, of the 14th of May, 1838. If the bill was filed in error as to that policy, the fault lay with the Defendants; but upon the service of that notice, the Company ought to have stopped, because it was the claim of *Henry Ashe* alone that entitled them to file the bill, and the moment he withdrew his claim, from that time the smaller policy stood on the same ground as the policy for 1700*l.* These costs are to be set off against the costs to be paid by the Plaintiffs to the Defendant *Locke*. By whom then are the costs thus incurred by *Locke* and *Tierney* in relation to the smaller policy to be paid? I am of opinion, that the Defendants

(*a*) See *Melville v. Smark*, 3 Mann. & G. 57; and *Crawford v. Fisher*, 1 Hare, 436.

*Henry and Elizabeth Ashe, and James Sullivan*, must pay those costs; for though the Company were wrong, yet the *Ashes* and *Sullivan* were still more in the wrong: *Sullivan* says he was misled by the settlement; but I see no foundation for this statement, nor any for his claim against the Company. I think I have full power to make this arrangement of the costs of the several parties, though this is an interpleader suit. There being now no adverse claim, the injunction will of course stand dissolved.

1842.  
GLYNN  
v.  
LOCKE.  
Judgment.

The *Solicitor-General*, for the Defendant *Tierney*, asked that the costs of this Defendant should be given against the Plaintiff in the first instance, the Plaintiff to have them over against the fund.

THE LORD CHANCELLOR:—I do not think I can do this upon a bill of interpleader.

Dismiss the Plaintiff's bill so far as same relates to the policy of 1700*l.*, with costs as to the Defendants *Thomas Locke, Edward Tierney*, and *John L. Locke*; but without costs as to the other Defendants. Let the bill be retained as to the policy of 425*l.*; and let the Plaintiffs have their costs thereof, so far as relates to the said policy up to the 24th of May, 1838, the time of the service of the notice of the 14th of May, 1838, by the Defendant *Henry Ashe*: and let the said costs be set off and allowed out of the costs to be paid by the Plaintiffs to the Defendant *Thomas Locke*: and let the said *Thomas Locke* be repaid the same by the Defendants *Henry Ashe, Elizabeth Ashe*, and *James Sullivan*: and let the said last-named Defendants pay to the Defendants

Decree.

1842.

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v.

LOCKE.

Decree.

*Thomas Locke, Edward Tierney, and John L. Locke*, their costs of this suit, so far as they relate to the said policy of 425*l.* incurred subsequently to the said 24th of May, 1838, and refer it to the Master to tax and ascertain the costs of the said several parties accordingly. Let the injunction be dissolved, and (the Plaintiffs consenting) let them pay the costs in the action at law to the Defendant *Thomas Locke*: and let the Accountant-General transfer to the Defendant *Edward Tierney* so much of the New Three and a Half per Cent. Government Stock to the credit of this cause, as shall at the price of the day be equivalent to the sum of 404*l.*, with interest thereon at the rate of six per cent., from the 2nd of June, 1827, to the day of such transfer: and let the balance of said stock, together with the cash in bank to the credit of this cause, be transferred to the Defendant *Thomas Locke*(*a*).

*Reg. Lib.* 86, 1842, fol. 362.

(*a*) See *Hoggart v. Cutts*, Craig given; and also *Crawshay v. Thornton*, 2 Mylne & C. 1. & P. 197, where the form of a decree in an interpleading suit is

1842.

*In Re PONSONBY, a Lunatic.*

THE Right Honourable *George Ponsonby*, by his last will and testament, bearing date the 11th of May, 1812, devised as follows: “ I give, devise, and bequeath to my wife the Lady *Mary Ponsonby*, for the term of her natural life, and for no longer or other period, all my estate and property, of whatever description, real, personal, or mixed; and, from and after her decease, I give, devise, and bequeath the same to my son *William Robert Ponsonby*, his heirs, executors, administrators, or assigns for ever. But whereas, my eldest son *John Ponsonby* is, from the derangement of his understanding, entirely incapable of taking care of, or managing himself, or his affairs, I do hereby order and direct, and my wish is, that my wife during the term she shall be in possession of my estate in the county of Londonderry, in the province of Ulster, in that part of the United Kingdom called Ireland, and my son *William Robert*, while he shall be in possession of the same, shall apply a sum not exceeding 400*l.* per annum to the maintenance and care of my said son *John*. And my wish is, that whoever shall at any time be in possession of my said Londonderry estate shall, during the life of my said son

Nov. 5, 12.  
*P.* by his will directed that his widow and second son, who were the devisees of his estates, should apply a sum not exceeding 400*l.* per annum, to the maintenance and care of his son *John*, who was a lunatic, and that whoever should at any time be in possession of his *L.* estate, should during the life of his said son, apply said sum annually for his comfortable support, care, and maintenance; and that said sum should be deemed, taken, and considered as a charge thereon. The *L.* estate was sold after the death of the testator, under a decree in a creditor's suit, and a sum of

10,550*l.* of the purchase money was invested in stock to the credit of the cause, to secure the payment of the lunatic's allowance, which, under an order of the Court, was fixed at 280*l.* per annum. At the death of the lunatic in 1842, the surplus of the dividends upon the stock amounted to 812*l.* 12*s.* 9*d.*; upon an application by the personal representative of the lunatic, claiming this sum as part of his personal estate, and a cross claim on part of the owners of the estate, claiming under the second son:—*Held*, that upon the true construction of the will, there was no greater charge upon the estate than what was actually required and applied for the maintenance and support of the lunatic; and that consequently, the sum in question did not form any portion of the personal estate of the lunatic.

*Held* also, that even if it did, yet that as the savings of the lunatic's maintenance, it belonged to the parties claiming under the widow and second son, who were in the situation of committee of the person of the lunatic; and that in any view of the case, the personal representative of the lunatic had no claim upon it.

*Semble*, the question had been already disposed of by the decree in the suit in 1837.

1842.

In Re  
PONSONBY.

Statement.

*John*, apply said sum annually for his comfortable support, care, and maintenance; and the same shall be decreed, taken, and considered as a charge thereon; and I do recommend that my said son *John* shall be continued under the care of Dr. *Willis*, with whom he now resides; but I do not by this recommendation mean to order or direct it, confiding entirely in the affection and discretion of my wife and my son *William*, that as each of them shall be in possession of my Londonderry estate aforesaid, they will respectively apply the sum necessary for his use (not exceeding 400*l.* per annum) in the way best suited to his unhappy state."

The testator died without having altered his will, and his widow, Lady *Mary Ponsonby*, entered into the possession of all his estates, real and personal, and continued in such possession until her death. In the year 1820, *William Robert Ponsonby* died; having by his will, bearing date the 5th of May, 1818, devised the Londonderry estate to trustees upon trust for the Honourable *Frances Ponsonby*, wife of the Lord Bishop of *Derry*, for life, for her separate use, with remainder to the said Lord Bishop of *Derry* for life, with remainder to the use of their first and other sons in tail male, with remainders over. After the death of *William Robert Ponsonby*, a suit was instituted by Mr. *Thomas Tydd*, a judgment creditor of *William Robert Ponsonby*; and on the 10th of May, 1829, a decree was pronounced, directing a sale of the Meath estate (which was part of the property of *George Ponsonby*), and in case that same should not be sufficient to pay the debts as well of *George Ponsonby* as of *William Robert Ponsonby*, then that the Master should proceed to a sale of the Londonderry estate.

In pursuance of this decree, the two estates were sold, the Meath estate producing a sum of 14,475*l.*, and the Londonderry estate a sum of 48,500*l.*

1842.  
In Re  
PONSONBY.  
Statement.

By an order in this cause of *Tydd v. Prittie*, bearing date the 14th of February, 1832, it was directed that a sum of 10,550*l.*, Old Three and a Half per Cent. Government Stock, produced by the sale of the Londonderry estate, should be transferred to a separate account, to the credit of the said cause, to be entitled "An Annuity Fund, for *John Ponsonby*, Esq., a Lunatic," with liberty to the committee of the person of the said *John Ponsonby*, or to any person entitled to receive the maintenance of the said lunatic, to apply from time to time during the life of the said lunatic, in relation to the dividends of said stock, and that the principal of said sum should stand impounded until after the death of the said *John Ponsonby*, with liberty to the parties and creditors in the cause to apply in relation thereto as they might be advised.

By an order of the 9th of March, 1832, the Accountant-General was directed to draw on the Bank of Ireland in favour of Dr. *Willis*, for a sum of 150*l.* half-yearly, out of the dividends accruing due on the said sum of 10,550*l.* Government Three and a Half per Cent. Stock, for the maintenance of the lunatic; but by a subsequent order of the 22nd of February, 1836, this allowance was reduced to a sum of 280*l.* annually.

By the final decree in the cause of *Tydd v. Prittie*, bearing date the 12th of January, 1837, it was ordered, amongst other things, that out of the annual dividends of said sum of 10,550*l.* Old Three and a Half per Cent. Stock, a competent sum should be applied towards the maintenance

1842.  
 In Re  
 PONSONBY.  
 Statement.

and support of said *John Ponsonby*; and that from and after the death of the said *John Ponsonby*, the dividends to accrue thereon, and in the meantime that the annual interest and dividends of the said funds then standing to the credit of the cause, and of all other such fund as should or might thereafter be brought into Court to the credit of the cause, be paid to the said *Frances Ponsonby*, or her attorney lawfully authorized, for and during the life-time of her husband the Lord Bishop of *Derry*, provided she should so long live; and from and after the death of the said *Frances*, and in case the said Lord Bishop of *Derry* should survive her, then the said dividends and interest were decreed to be paid to the said Lord Bishop of *Derry*, for and during his natural life; and from and after the death of the survivor of them, then to their only son *William Brazon Ponsonby*.

On the 31st of March, 1842, *John Ponsonby* the lunatic, died; and it appeared, that after payment to Dr. *Willis* of the respective annual sums pursuant to the orders of the 9th of March, 1832, and the 22nd of February, 1836, and also the sums due for medical attendance and funeral expenses, there remained a sum of 812*l.* 9*s.* 11*d.*, being the surplus of the dividends which accrued due on the said sum of 10,550*l.* stock.

Argument.

Mr. *Bessonnet* now moved on the part of the Honourable *Francis Prittie* and *Elizabeth* his wife, who was administratrix of the lunatic, that this sum should be paid over to them, as constituting part of the personal estate of the lunatic.

THE LORD CHANCELLOR :—

There was a case before Lord *Brougham* of *Grosvenor* v. *Drax*(*a*), where he directed an account, such as is here sought, against the committee of the lunatic. The order was a new one, and the committee appealed to the Privy Council. All the great lawyers of the day were assembled—Lord *Brougham*, Lord *Eldon*, Lord *Lyndhurst*, Lord *Manners*, Lord *Wynford*, Sir *William Alexander*, Sir *John Leach* ;—the question was solemnly argued, whether such an account could be ordered : and it was held unanimously, that the committee was entitled to retain the savings of the lunatic's maintenance, and the order was reversed. Since that case the point has never been raised, and the savings have always been considered as belonging to the person who had the care of the lunatic, and not to the lunatic's personal estate. But it seems to me that the decree pronounced in the year 1837, in the cause of *Tydd* v. *Prittie*, has disposed altogether of the question. I wish counsel would look into this point, and mention the case again on this day week.

1842.  
In Re  
PONSONBY.  
Judgment.

In the meantime a petition was presented on the part of the Lord Bishop of *Derry* and *Frances Ponsonby*, his wife, under the will of *William Robert Ponsonby*, the second son of the testator, praying that this surplus might be transferred to them.

Nov. 12.

Mr. Serjeant *Warren* and Mr. *Hawkins* for the Bishop of *Derry* and *Frances* his wife ;

Mr. *Bessonnet* for *Prittie* and wife, referred to *Seale* v. *Seale*(*b*).

(*a*) 2 Knapp, 82.

(*b*) 1 P. Wms. 290.



1842.

*In Re*  
PONSONBY.*Judgment.*

THE LORD CHANCELLOR:—

If this case rested on the will alone, the point would seem to be free from doubt. The testator, by his will, directs that his wife and son, the devisees of the testator, “shall apply a sum not exceeding 400*l.* per annum, to the maintenance and care of my son, *John*; and my wish is, that whoever shall at any time be in possession of my said Londonderry estate, shall, during the life of my said son, apply said sum annually for his comfortable support, care, and maintenance, and that sum shall be deemed, taken, and considered as a charge thereon.” Then he recommends that he shall be continued under the care of Dr. *Willis*, with whom he was then resident; and again provides, that his wife and son, as each of them shall be in possession of his estate, shall apply the sum necessary for his use (not exceeding 400*l.* per annum) in the way best suited to his unhappy state.” The argument for the administratrix assumes, that under this will, there is an actual charge upon the estate to the extent of 400*l.* per annum. But such is not the case. There is nothing more than a direction that his wife and son (the testator seems not to have contemplated the probability of the lunatic’s surviving both) shall apply a sum not exceeding 400*l.* The effect is, that the sum of 400*l.* should be applied, if necessary, and to that extent the estate is charged; but if so large a sum should not be required, then the will does not make any sum beyond what was required, a charge. I am clearly of opinion, that there was no greater charge upon the estate, than what was actually required and applied for the maintenance and support of the lunatic. The widow and second son were placed in the situation of committee of the person of the lunatic; it was left to their discretion what sum should be applied to the maintenance of the lunatic. Therefore,

every point of view, whether the widow and son are looked upon as committee of the lunatic, and as such entitled to the savings, according to *Grosvenor v. Drax*, or owners of the estate upon which this sum was no charge, except to the extent in which it should be required, I am of opinion, that the present petitioners, claiming under the widow and second son, are entitled to this surplus.

1842.  
In Re  
PONSONBY.  
Judgment.

But independently of this, it appears to me, that the decree which was pronounced on the 12th of January, 1837, includes the point; for it directs that out of the annual dividends of the said sum of 10,550*l.* Old Three and a Half per Cent. Stock (which sum had been invested by an order on the 11th of February, 1832, upon the sale of the estate, to produce an annuity fund for the lunatic), a competent sum should be applied towards the maintenance and support of the lunatic; and that from and after his death, the dividends and interest to accrue from said sum, and in the mean time, that the annual interest and dividends should be paid to the said *Frances Ponsonby* (one of the petitioners) during her life, and after her death, to her husband; and after the death of the survivor, it directs that the entire principal sum shall be paid to their son, the inheritor of the estate. Now this perfectly disposes of the question. I shall, therefore, in this case, follow the decree, and declare, that *Frances Ponsonby* is entitled to the surplus of the dividends of the government stock.

1842.

*Ex-parte* PASLEY.

Nov. 5.

A coroner discharged from his office for neglect of duty, by the authority of the Great Seal.

IN this case an application was made on the part of the Crown, that a writ *de coronatore exonerando*, and one *de coronatore eligendo* should issue, directed to the Sheriff of the County of Dublin, for the removal of *John Pasley*, from the office of coroner for the said county, and for the election of a coroner in his place.

A petition had been presented on the part of certain freeholders of the county of Dublin, stating that *John Pasley*, one of the coroners of the county of Dublin, was unfit and incapacitated to hold that office, by reason of occasional mental derangement: that the said *John Pasley* was addicted to habits of intemperance, and on several occasions had been found drunk in the streets of the city of Dublin: that on the 9th of August, 1842, the said *John Pasley* was tried and convicted of a conspiracy to obtain money on false pretences, and had been sentenced to be imprisoned for the term of six calendar months.

The petition had been personally served upon Mr. *Pasley* in jail.

*Argument.*

The *Attorney-General*, in support of the petition, contended, that though there was no Statute in force in Ireland corresponding to the 25th Geo. II. c. 29, in England, yet that the Great Seal had full power to make the required order independently of that Statute; and referred to the opinion of Lord *Eldon* in *Ex parte Parnell*(a).

THE LORD CHANCELLOR granted the application.

(a) 1 Jac. & W. 451.

he Matter of Sir GEORGE VESEY COL-  
THURST, Bart., and Others, Minors.

1842.

Nov. 5, 7.

indenture of lease of the 17th of February, 1708, the Hol-  
ford Blade Company, being then seised in fee of the  
of East and West Garvagh, in the county of Cork, de-  
he same to *Thomas Ware*, his heirs and assigns, for  
es of *Thomas Weld*, *Jonathan Ware*, and *James*  
at an annual rent of 30*l.*, and one shilling in the  
for receiver's fees. This lease contained a covenant  
petual renewal on payment of a renewal fine of 15*l.*  
six months after the fall of every life.

*H.* demised cer-  
tain premises  
to *B.* for three  
lives, with a  
covenant to re-  
new from time  
to time, on the  
nomination of a  
life, and pay-  
ment of a fine  
of 15*l.* within  
six months  
after the death  
of each *cestui*  
*que vie.* *B.*  
under-let the  
same premises  
to *C.*, also for  
three lives,  
with a similar  
covenant for  
renewal, and at  
a like renewal  
fine, and with  
a proviso, that  
in case *C.* should  
neglect to no-  
minate a new  
life, and pay  
the fine, with-  
in six months  
after the death  
of each *cestui*  
*que vie.*, *C.*  
should pay a

indenture of lease of the 20th of August, 1714,  
is *Ware* under-let the same premises to *Barra-*  
*owe*, for three lives, *Thomas Weld*, *James Ware*,  
*arrachia Dowe* (two of which were different from  
es in the head-lease of 1708), at the rent of 47*l.*,  
covenant for perpetual renewal, on payment of a  
renewal fine to that reserved by the head-lease of

s. for every month during which he should so neglect to add such life and pay such fine.  
quently purchased the interest of *H.* and no renewal was obtained by either party for  
lf a century.

rson claiming under *C.* being a ward of the Court, a petition was presented in the  
tter on the part of the person representing *B.*, for a reference as to what was due  
nd renewal fines, on foot of the lease from *B.* to *C.*; and also for an account of  
nd septennial fines, and interest, on account of the original lease from *H.* to *B.*; and  
for that purpose was obtained. Shortly afterwards, in consequence of the death of  
aterially interested, a second petition was presented praying, in addition to the above  
for a reference as to what was due for fines and penal rent under the said lease from  
but the order made thereon was in same terms as the preceding one, and was silent  
penal rents:—*Held*, that the Master, in proceeding under this reference, was not  
l in taking an account of the penal fines due on foot of the lease from *B.* to *C.*  
, that it was to be inferred from the circumstances of the case, that the parties had  
to an agreement not to require any renewals to be executed.  
lly speaking, an outstanding legal estate is not an answer to the obligation on the part  
it to pay the renewal fines.

1842.  
 In Re  
 COLTHURST.  
 Statement.

On the 24th of December, 1714, Mr. *Henry*, who had become entitled to the interest of the Hollow Sword Blade Company in these premises, executed a renewal of the original lease of 1708, to *Thomas Ware*: and on the 6th of May, 1737, there was a second renewal executed by *Henry* to *John Ware*, who then was entitled to the immediate tenant's interest, for the lives of *Barrachia Dowe*, *John Ware*, and *William Ware*.

Shortly afterwards, *John Ware* granted a renewal of the sub-lease of 1714 to *Hannah Gillman*, in whom the interest of *Barrachia Dowe* had become vested, for the same three lives as were contained in his own lease of the 6th of May, 1737. The last renewal of the under-lease was executed on the 2nd of November, 1782, and was granted by *Thomas Ware* to *John St. Leger Gillman*, who then represented the interest of the under-lessee, for the lives of *John St. Leger Gillman*, *Hayward St. Leger Gillman*, and *Josiah Martin*, which latter life was still in existence.

By indenture of the 23rd of August, 1740, *Hannah Gillman*, who then represented the under-lessee, demised a portion of the lands comprised in it, namely, the lands of East Garvagh, to *John Colthurst*, in trust for one *William Barrett*, for the lives of *James Colthurst*, *Nicholas Colthurst* of Ardrum, and *Nicholas Colthurst* of Carrignavin, at the yearly rent of 40*l.*: and by this lease, *Hannah Gillman* covenanted, that upon the fall of any of the said lives, on the application of the lessee, his heirs or assigns, and upon payment of a sum of 7*l.* 10*s.* for each new life to be added, and of all rent then due (provided such application should be made within six months after the decease of any of the said lives), she, the said *Hannah Gillman*, her heirs and assigns, would execute a

new lease of the premises, with the like covenants ; inserting therein such new life as the said lessee, his heirs and assigns, should nominate ; and so from time to time upon the fall of each life, as often as occasion should require : “ Provided always, and it is the true intent and meaning of these presents, that the said *John Colthurst*, his heirs and assigns, shall from time to time, after the expiration of six months after the fall or decease of any of the said lives, or other lives thereafter at any time to be added and inserted, pay the fine or sum of twenty shillings every month, until such time as the said *John Colthurst*, his heirs or assigns, shall insert a new life instead of such life so falling : and that if the said *John Colthurst*, his heirs or assigns, shall neglect to pay such fine, and add such life within the space of six months next after the decease of any former life, then and in such case, the covenant of renewal shall be void, and the said lease shall determine at the expiration of the life and lives then in being.”

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On the 2nd of February, 1752, the said *Hannah Gillman* demised the lands of West Garvagh, the residue of the lands comprised in the original lease, to *Mark Draper*, in trust for *Edmond Barrett*, at the yearly rent of 50*l.*, for the lives of *Nicholas Colthurst*, of Carrignavin, *James Colthurst*, and *Edmond Broders*, with a covenant for perpetual renewal similar to that which was contained in the lease of the 23rd of August, 1740, of East Garvagh, upon payment of a fine of 7*l.* 10*s.*, upon the fall of each life, and subject to a like penal rent of twenty shillings for every month, which should be permitted to elapse without renewing, upon the expiration of six months after the fall of each life.

*James Colthurst*, one of the *cestui que vies* in these sub-

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leases of August, 1740, and February, 1752, having died, on the 10th of March, 1760, a renewal of the lease of the 2nd of February, 1752, was executed by *Elizabeth Anne Gillman* to *Edmond Barrett*, for the lives of *Nicholas Colthurst*, *Edmond Broders*, and the said *Edmond Barrett*, in consideration of the renewal fine of 7*l.* 10*s.*, and the further penal fine of 22*l.* 6*s.* 8*d.*; and a receipt was indorsed upon this renewal for the said renewal fine of 7*l.* 10*s.*, and also for the sum of 22*l.* 6*s.* 8*d.*, as the penalty for not having renewed after the death of *James Colthurst*, for twenty-two months and ten days, after the said six months had elapsed.

On the same day, the 10th of March, 1760, *Elizabeth Anne Gillman* also executed a renewal of the lease of the 23rd of August, 1740, to *William Barrett*, for the lives of *Nicholas Colthurst* of Ardrum, *Nicholas Colthurst* of Carrignavin, and the said *William Barrett*.

In the year 1766, a renewal of the lease of the 19th of May, 1737, was granted by *John Ware* to *Henry Martin* and *Elizabeth Martin*, otherwise *Gillman*, his wife: and on the 4th of April, 1771, there was a further renewal of the said lease by the said *John Ware* to *Martin* and wife, for the lives of *William Ware*, *John St. Leger Gillman*, and *Heyward St. Leger Gillman*.

In the year 1782, *William Barrett*, as the heir of *Edmond Barrett*, having become possessed of the interest which *Edmond* was entitled to in the lands of West Garvagh, by indenture of lease of the 1st of November, 1782, demised both East and West Garvagh to Sir *John Conway Colthurst* for three lives, with covenant for perpetual renewal, at a yearly rent of 165*l.*, and with a peppercorn renewal fine.

On the 6th of June, 1782, *William Ware* died ; he was the surviving *cestui que vie* in the last renewal of the head-lease of the 6th of May, 1737, granted by *Hugh Henry* to *John Ware* ; the two other lives having dropped in the years 1762 and 1767, and no renewal was obtained : and in the same year, 1782, *Thomas Ware*, who was entitled to the beneficial interest in that lease, by indenture of the 2nd of November, 1782, renewed the sub-lease of the 4th of April, 1771, to *John St. Leger Gillman*, for the lives of the said *John St. Leger Gillman*, *Heyward St. Leger Gillman*, and *Josiah Martin* : and at the same time, *John St. Leger Gillman* renewed to *William Barrett* the lands of West Garvagh for the lives of *Nicholas Colthurst* of Carrignavin, *Edmond Broders*, and *William Barrett* ; and this renewal was stated to have been made in consideration of a renewal fine of 7*l.* 10*s.* and 11*l.* 13*s.* 4*d.*, which latter was called a penal fine, or a payment *nomine pænæ*, for having neglected to renew.

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Sir *John Conway Colthurst*, who was the lowest under-tenant, finding that all the *cestui que vies* in the head-lease had dropped, in order to preserve the interest, paid to the head landlord *Hugh Henry*, the amount then due for renewal fines and interest, and obtained from his agent an acknowledgment, which was in the following terms : “ Received from Sir *John Conway Colthurst*, Bart., under-tenant of the lands of Garvagh, the sum of 194*l.* 15*s.* 7*d.*, in full for renewal fines and interest due to *Hugh Henry* from the representatives of *John Ware*, the lessee of said lands, on the failure of the lives of *John Ware*, *William Ware*, and *Barrachia Dowe* ; and I promise on behalf of said *Hugh Henry*, to execute a renewal of the former lease for the lives of *Elizabeth Colthurst*, the Duke of York, and



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the Honourable *William Tonson*.—JOHN HILL.—23rd of September, 1784.”

*Statement.*

On the 25th of May, 1787, an account was settled between Sir *Nicholas Colthurst*, as the executor of Sir *John Colthurst* and *John St. Leger Gillman*, in which Sir *Nicholas Colthurst* was allowed credit for the payment so made to *Henry* in preservation of the interest under the original lease of 1708.

No renewal, however, was ever obtained of that lease. In 1789, Sir *Nicholas Colthurst*, under a decree of the Court of Exchequer in a suit instituted by a mortgage creditor of *William Barrett*, purchased the estate of *Barrett*; and subsequently, in the year 1806, he purchased the interest of *Henry*, the head landlord, and the same was conveyed to Mr. *La Touche*, in trust for Sir *Nicholas Colthurst*.

On the 18th of February, 1835, a petition was presented by *Hannah Elizabeth Gillman*, and others, in the matter of Sir *Nicholas Conway Colthurst* and others, minors, praying, that it might be referred to the Master, to inquire and report, whether it would be for the benefit of the minors in said matter, that a renewal should be executed of the indenture of lease of the 20th of August, 1714, and whether it would be for the benefit of the minor, to accept of renewals of the leases of the 23rd of August, 1740, and the 2nd of February, 1752; and if so, that the Master should take an account of the rent and renewal fines, then due and payable by the said minors. Upon this petition, an order was made at the Rolls, whereby it was referred to the Master, to inquire and report, whether it would be for the benefit of the minor, Sir *Nicholas Conway Colthurst*, that any and what

renewal of the said lease, bearing date the 20th of August, 1714, should be executed on behalf of the said minors, and whether there were any and what renewal fines, septennial fines, and interest due thereon; and also, whether it would be for the benefit of the said minor, that the receiver in the matter should proceed to procure renewals of the leases dated the 23rd of August, 1740, and the 2nd of February, 1752, and if so, to report whether there were any and what renewal fines, septennial fines, and interest, due thereon. And it was further declared, that the Master should report, whether the rights of *Thomas Ware*, under the lease bearing date the 17th of February, 1708, were then vested in any person and in whom, and under what circumstances.

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Sir *Nicholas Conway Colthurst* died shortly after the obtaining of this Order, and his interest devolved upon Sir *George Vesey Colthurst*; and in the month of June, 1837, a second petition was presented in the present matter; on the part of the *Gillmans*, who had, on the 17th of April, 1837, obtained a conveyance from *Mary Baldwin*, the representative of the *Ware* family, of their interest as lessees under the original lease of 1708, praying that it should be referred to the Master, to inquire and report whether it would be for the benefit of the minors, or any of them, to execute a renewal of the lease, under which *John Ware* held the lands, in pursuance of the undertaking of the 23rd of September, 1784, and if so, upon what terms; and also, whether it would be for the benefit of the minors or any of them, to accept a renewal of the original leases of the 23rd of August, 1740, and the 2nd of February, 1752, and if so, upon what terms, and to take an account of what was due for fines and penal rent thereon respectively.

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On the 28th of June, 1837, an order was made at the Rolls on this petition, and it was referred to the Master to inquire and report, whether it would be for the benefit of the minor, Sir *George Vesey Colthurst*, that any and what renewal should be executed on behalf of the said minor, of the lease of the 17th of February, 1708, and whether there were any and what renewal fines, septennial fines, and interest due thereout; and also, to inquire and report whether it would be for the benefit of the minors, that the receiver in the matter should proceed to procure renewals of the leases bearing date, respectively, the 23rd of August, 1740, and the 2nd of February, 1752, and whether there were any and what renewal fines, septennial fines, and interest due thereout; and that the Master, in proceeding under the order, should set off the renewal fines, septennial fines, and interest payable under the lease of the 17th of February, 1708, against the renewal fines, septennial fines, and interest under the other two leases of August, 1740, and February, 1752, and should ascertain the balance, if any, and by whom it was payable.

The Master, in pursuance of this order, made his report on the 13th of January, 1842, and thereby found that it would be for the benefit of the minor, that he should execute a renewal of the lease of the 17th of February, 1708, and that the renewal fines, septennial fines, and interest, due on foot of that lease, amounted to a sum of 297*l.* 2*s.* 5*d.* He also reported, that it would be for the benefit of the minor, that the receiver should proceed to obtain renewals of the leases of the 23rd of August, 1740, and the 2nd of February, 1752. That in respect of those two leases, there was due for renewal and monthly fines, the sum 297*l.* 7*s.* 9*d.*

and that consequently there was a balance due and payable by the minor, Sir *George Vesey Colthurst*, of 2674*l. 5s. 4d.*

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It appeared from the report, that the Master in calculating the amount payable for fines and interest, in respect of the renewal of the lease of the 17th of February, 1708, had added the six months allowed for renewal after the fall of each life, to every septennial period; whilst in calculating the sums payable by the minor to the petitioners in respect of the renewals of the 23rd August, 1740, and the 2nd of February, 1752, respectively, he allowed a renewal fine on the fall of each life, and then allowed twenty shillings for every month which elapsed after the expiration of six months from the time of the decease of each *cestui qui vie*.

A petition was presented at the Rolls, on the part of the minor, seeking to have this report referred back to the Master, for the following reasons. First, because the Master was not warranted by the order of reference, in taking any account of monthly fines and penalties, or in including the same in his report. Secondly, because the parties obtaining the order of reference should be considered as having waived any right to such monthly fines, on getting credit for the stipulated renewal fines, septennial fines, and interest. Thirdly, because the petitioners, or the persons under whom they derived, had not obtained any renewal of the lease under which they held, so as to enable them to renew the leases held by the minor, Sir *George Vesey Colthurst*, or to entitle them to require any renewal of their lease of the lands from the minor, as the inheritor thereof, until the execution of the deed of assignment of the 17th of April, 1837. Fourthly, because the petitioners, and the persons under whom they

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derived, were guilty of default, in neglecting to procure a renewal of the original lease of the premises, on the decease of *Elizabeth Colthurst*, and were incapable of granting any valid renewal of the under-leases, during the period when such monthly fines were alleged to have accrued. And lastly, because the Master only allowed the minor septennial fines at the end of every seven years and six months, after the fall of each life, whereas such septennial fines, with interest, ought to be allowed from the day when each septennial period was completed.

The case was much discussed at the Rolls, and his Honor overruled the objections to the report, but without costs. From this decision the minor appealed.

The arguments in the Court below, and the judgment of the Master of the Rolls, are reported in Messrs. *Flanagan & Kelly's Reports*, page 515(a).

Argument.

Mr. Serjeant *Warren*, and Mr. *Furlong*, for the Appellant.

The Master was not warranted by the order of reference, in taking the account in the manner he has; no doubt the parties in their petition asked for an account of what was due for fines and penal rent, on foot of the leases of the 23rd of August, 1740, and the 2nd of February, 1752, respectively, but this was not granted, for the only inquiry that was directed was, "whether there were any and what renewal fines, septennial fines, and interest due thereout." In this respect, therefore, the report is clearly wrong. But

(a) See also 4 Ir. Eq. R. 444.

even independently of this, and assuming that the Master was justified in taking this account, the principle of the calculation is erroneous. It is true that the tenant must make compensation, where he has been guilty of any default.

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But it is not mere compensation which the parties here ask for; penalties are sought, whereby the Respondent would be placed in a much better situation, than if the tenant had not been in any default, and that too, in a case in which it must be remembered, that the landlord was not himself in a position to grant a renewal. The latter observation brings the case within the authorities of *Wilson v. St. Leger*(a), and *Morton v. Archbold*(b), which establish this proposition, that when the mesne landlord himself has not a legal interest, he cannot enforce from his tenant the penal rent. It cannot be denied, that this penal rent is in substance a penalty, which is odious in the law, and not to be enforced by a party to a contract, unless he is himself in a position to perform his part of the contract. Such was not the case here, for the Respondents, and the party whom they represent, have not had any legal estate since the year 1782. In *Lord Doneraile v. Chartres*(c), *Chartres* had the fee, and could have granted the renewal at any moment, and the penalties were properly enforced. His Honor, in pronouncing his judgment in this case, puts that of a landlord having executed a mortgage subsequent to the lease, and previous to his being required to execute a renewal; and he states his opinion to be, that in such a case, "the tenant could not justify his refusal or neglect to pay the fines, merely because his landlord could not grant by the renewal a legal

(a) Flan. & K., 536 (n); 4 Ir. R. 460.  
Eq. R. 457(n). (c) 1 Ridg. P. C. 122.  
(b) Flan. & K. 535 (n); 4 Ir. Eq.

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estate." But this proposition cannot be supported ; the legal estate being outstanding in the mortgagee, would clearly disentitle the landlord to demand the penalties. In the present case the Appellant has enjoyed the property, and the Respondents, as representing the landlord, are therefore, entitled to compensation, the measure of which compensation is the septennial fines and interest.

Mr. Brooke and Mr. John Sealy Townsend for the Respondents.

This case is governed by the principle of *Lord Doneraile v. Chartres(a)* : that was a case of considerable hardship, for there the tenant was always willing to pay the fines ; it was a case of ignorance and not of default ; and yet the Court granted the renewal only on payment of the renewal fines and the monthly penalties, such being the express contract of the parties. It is a mistake to call these monthly fines penalties ; they constitute part of the express contract of the parties. Where there has been no such contract agreed upon, the customary compensation is septennial fines and interest : but where the parties have fixed upon a compensation, which in the present case is a monthly fine, the Court cannot relieve the party from the payment. It seems to be admitted, that the Respondents are entitled to septennial fines and interest. If this be so, it seems difficult to understand upon what principle they are not to be entitled to these monthly fines, which are the express compensation agreed upon between the parties, to be taken in lieu of the customary compensation, the septennial fines and interest. The Appellant has sought both here and in the Court below, to distinguish

(a) 1 Ridg. P. C. 122.

this case from *Lord Doneraile v. Chartres*, by this circumstance, that we the landlord here being middlemen, and not having ourselves obtained a renewal, could not grant a legal renewal, and, therefore, were not entitled to the monthly fines. But in the first place there is a life still subsisting in our last renewal from *Thomas Ware* to *John St. Leger Gillman* of the 2nd of November, 1782. And independently of this, the rule of law is not such as has been stated, for it is quite clear, that unless the mesne landlord has actually forfeited his equitable title to a renewal, the undertenant cannot refuse to pay the septennial fines and interest. This is the doctrine of Lord *Redesdale* in *Jackson v. Saunders*(a): *Mortlock v. Wills*(b) is to the same effect; and in *Hunt v. Sayers*(c) the Court of Exchequer held, that the septennial fines were properly demanded by a middleman from his tenant for a period during which he had no legal estate, and that by reason of the tenant's refusal to pay these fines, when demanded, he had actually forfeited his right to a renewal. With respect to the technical objection, that the order of reference did not warrant the report, the words of the order are sufficiently comprehensive to authorize an account of these monthly rents. It was asked for by the prayer of the petition, and there is no doubt that it was intended to have included such an account in the order.

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THE LORD CHANCELLOR :—

I have looked into this case with some attention, since it was argued. It does not appear to me that there is much difficulty in it; I am much more embarrassed by the facts,

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(a) 1 Sch. & L. 443, 460.

(c) Hayes, 590.

(b) Hayes, 596 (n).



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than I am by the law, of the case. In the case of *Lord Doneraile v. Chartres*(a), the condition of the lease was, that if the tenant did not renew within a certain period, he should forfeit a sum *nomine pœnæ*. The decision in that case, that if a party seek a renewal, he must comply with the precise terms of the lease, is one, which the Court must necessarily follow under like circumstances. It is said not to be in dispute, that where, as in that case, the lessor has all along had the power to grant a legal renewal, the terms must be complied with by the lessee, and compensation, which is now understood to be the septennial fine, when the right to it accrues, or any sum which may be imposed by the instrument itself, must be paid. Of course the right I speak of is under the Tenantry Act(b), which requires that compensation should be made, without saying what the compensation ought to be. In this case there is not any difficulty on that ground. The only objection is to the title of the landlord to grant the renewal. It is said, that when the landlord cannot grant a legal renewal, there cannot be such neglect on the part of the tenant, as will enable or induce the Court to enforce the penalty. That is too general a proposition. The case of *Morton v. Archbold*(c), which came first before Sir *William M'Mahon*, when Master of the Rolls, and afterwards on appeal before Lord *Manners*, is a singular one no doubt. According to the statement of the case, as it came before the Lord Chancellor, there seems to have been a misapprehension as to the life of one of the *cestui que vies*. There had been a renewal of the under-lease. One of the lives in the renewal was a person named *Vickers*. He

(a) 1 Ridg. P. C. 122.

(b) 19 & 20 Geo. III. c. 30.

(c) 4 Ir. Eq. R. 457 (n).

was treated as an existing life, whereas it turned out, that he had been dead for many years. The receiver then called on the sub-lessee to pay the septennial fines and interest, from the time of the death of that life. *Vickers* had been named as an existing life in the head-lease from the Meath family, and the receiver had been forced to pay a large sum for renewal fines in order to obtain a renewal. But at the time, when the demand was made from the under-lessee, that renewal had not been obtained. The under-tenant therefore said, that he was not in default, and was not bound to pay those fines, because at the time of the demand the landlord had no title to grant a new lease. This argument prevailed with Sir *William M'Mahon*, but his order was reversed by Lord *Manners*, who put his decision on the true ground, that the under-lessee was bound to pay the fine from the time the life dropped, and that the circumstance, that the original lease had not been renewed, was no reason why the sub-tenant should not pay, inasmuch as he had enjoyed the land. That decision certainly goes a considerable way. It was a case in which there was no title, when the demand was made; the landlord had no existing equitable estate, much less a legal estate. The case of *Hunt v. Sayers*(a) was also, I must say, rather a hard case on the tenant, because it was held in that case, that the refusal to pay the septennial fine amounted to a forfeiture. Although according to the facts of the case, the landlord was unable during a considerable period, to grant the renewal, yet being in a capacity to give that renewal, at the time of the demand, and the tenant having been during the whole time in the undisturbed enjoyment of the premises, the Court held, that he was bound to pay

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Judgment.

(a) *Hayes*, 590.

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the whole fine, and that his refusal to do so amounted to a forfeiture. No one could have objected to his being held bound to pay, notwithstanding the previous disability in the landlord. I apprehend that there can be no doubt that, in an ordinary case, such a claim as this would be enforced; but it is impossible to say that no circumstances would vary the rule. Generally the rule is, that an outstanding legal estate will not be an answer to the obligation to pay the fines. I think the matter stands thus. Supposing the lessor to be under an obligation to renew, and then to mortgage his estate, the tenant has a perfect right to say that he will pay to the mortgagee. But supposing that no demand is made, and that he subsequently seeks a renewal, he cannot set up the mortgage as an excuse for not paying the fine, which has become payable. He could not set up the circumstance of there being a mortgage, because the mortgagee would be bound by the lessor's covenant to renew, and therefore the lessee could have obtained a title under the mortgagee. I apprehend, therefore, that an outstanding legal estate cannot stop the right to the fines; but there may be circumstances which would vary the rule. Take the case of a middleman and a single under-lessee, or half a dozen, holding successively under each other: if the last man says I will not pay, because you have not yourself obtained a renewal; the right of renewal might be altogether lost, for the money may be required by each successive tenant up to the fountain-head to pay the fines. The under-lessee cannot be permitted to relieve himself from his contract by saying, I will not pay you the fine, because you have not yourself got the legal estate: but he may say, you are bound to renew, and to protect me, and I have a right to see that my money goes to the right quarter: let the acts be simultaneous, my pay-

ment to you, and your payment to the party over you. This is matter of arrangement, and is perfectly fair. But it is not an answer on the part of the under-lessee to say, that he will not pay, because the middleman has not renewed.

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*Judgment.*

I am not satisfied that I know enough of the facts, on which the decision in the case of *Wilson v. St. Leger*(a) turned. That was in effect an application by an under-tenant of Lord *Doneraile's* successor, who had himself obtained a decision of the House of Lords on a similar lease. It was decided first by the Master of the Rolls; secondly by Lord *Manners*; and thirdly, by the award of two eminent counsel, that the Defendant was bound to execute the renewal, upon being paid a renewal fine without any septennial fines or penalties. I think there must have been some peculiar circumstances in that case; for the decision of the House of Lords was then recent; it was concerning the same estate, and on a similar clause, and it is impossible that the Court, or the barristers, to whom the case was referred, could have decided contrary to the decision in the House of Lords, without some sufficient ground. The rule clearly amounts to no more than this, that the landlord is entitled to the fine, although he has not himself renewed his lease, but that there may be circumstances, which would prevent the application of the rule. I do not apprehend, that I am called on to decide the question of law in this case; but I have considered it for the purpose of seeing whether there are such circumstances in the case as would prevent the application of the rule.

This case is very peculiar in its circumstances, and

(a) *Flan. & K.* 536 (n); 4 *Ir. Eq. R.* 457 (n).

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comes before me under great disadvantages, as the papers are not here, and the facts are only shortly stated in the report, and I should require more papers to be laid before me, if it were necessary to decide upon the merits of the case. The facts appear to be these. The Hollow Sword-blade Company in the year 1708 granted a lease for lives renewable for ever to a Mr. *Ware*; this lease was from time to time down to 1737 regularly renewed by different members of the *Ware* family. The rent was 30*l.* a year, and there was a renewal fine of 15*l.* upon the falling of each life. The lessee under that lease granted an under lease to a person of the name of *Dowe*, reserving to himself a profit-rent of 17*l.*, and with precisely the same renewal fine, 15*l.* for each life. That under-lease was renewed from time to time down to so late a period as 1782. In the year 1740, *Hannah Gillman*, who was then entitled to the under-lease, executed an under-lease, and in the year 1752 a second under-lease of the two denominations, East and West Garvagh, at considerably improved rents, and with a renewal fine upon the fall of each life of 7*l.* 10*s.* in each lease; thus making up between the two leases the same renewal fine of 15*l.*, which she was herself bound to pay; and there was a clause imposing the penalty in question.

Now this proviso is certainly not very correctly penned. If I were to proceed upon the merits alone, I should require to see the original lease, for the condition, according to the report, is, that the tenant shall pay a sum of 7*l.* 10*s.* for each new life, to be added in six months after the dropping of each former life: and if the lessee neglects to do that, he must pay twenty shillings from and after the expiration of six months, for each month he neglects to renew; but then it goes on to provide, that if the fine be

not paid within the six months, the right to the renewal shall cease, and the lease determine at the expiration of the life and lives then in being. Now these provisions are inconsistent, for while on the one hand the renewal is to be granted after the lapse of six months, on payment of a stipulated sum, in the very next sentence a forfeiture is to be incurred, if the life is not named within the six months. However, I need not embarrass myself with that difficulty at present.

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*Judgment.*

In 1782 the lessees claiming under those sub-leases, executed an under-lease to Sir *John Conway Colthurst* at a pepper-corn fine, but under a large rent; and so things stood, when in the same year, *Thomas Ware*, who was then entitled under the original lease, granted a renewal to *Gillman*, having at that time no legal estate to enable him to make that grant, for the surviving life in the original lease had expired, and he had not himself obtained a renewal. In 1784, Sir *John Conway Colthurst*, the occupying tenant under the last lease, paid the renewal fines to the owner of the fee, a gentleman of the name of *Henry*; the estate having passed from the Company into his hands; and on that occasion, he obtained a receipt from Mr. *Henry's* agent, which amounted to an equitable renewal, and also gave efficacy in equity to the lease of 1782. In three years afterwards an account was stated between *Colthurst* and *Gillman*, and *Colthurst* was allowed in the rent the amount of fines which he had paid to *Henry*. Thus, that transaction was set right through the money and by the intervention of Sir *John Colthurst*. Matters remained in this state, until 1789, when Sir *John Colthurst* having purchased up the interest of his lessor, *Barrett*, became the immediate lessee of *Gill-*

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 Judgment.

*man* ; and subsequently, in 1806, Sir *John* purchased the reversion in fee, which belonged to Mr. *Henry*. The interests then stood thus : Sir *John Colthurst* had the fee, and was liable to grant a renewal to *Ware*, by reason of the original obligation ; This is No. 1. *Ware* was bound to grant an under-lease, No. 2, to the *Gillmans* ; and then the *Gillmans* were liable to grant the under-lease, No. 3, to Sir *John Colthurst*. Let us see how the matter would stand, if *Ware* were out of the way. In point of fact, in 1837 the *Gillmans* obtained *Ware's* interest for a nominal consideration ; which I am surprised at, for he had a perpetuity of 17*l.* a year. However the fact appears to be so, and *Ware* may be put out of consideration. How then stood the matter ? Sir *John Colthurst*, having the fee simple, was bound to grant a lease to *Gillman* at 15*l.* for the substitution of each life in the place of those who should drop, and *Gillman* was bound to grant an under-lease to the same Sir *John Colthurst* at the like fine. Therefore, supposing the lives to be the same, the interests of the parties would be identical, and the fines would be out of the question ; the renewal fines would only then be a matter to be put upon paper, and the single question between the parties would be the amount of rent. It is perfectly plain, why the *Gillmans* did not stir sooner in the case ; it was their interest not to be saddled with the expenses of renewals : they had obtained all they could want. They never could have any profit from the lease, except the surplus rent, because if they obtained the sum of 15*l.* from Sir *John Colthurst* upon the dropping of a life, he in another capacity would have required the same sum precisely from them, if the lives were the same ; and if different, as they were, it was but a mere question of chances, which life should drop first, which no one would take the trouble of looking

after, more particularly in this case, where Mr. *Ware* does not appear to have thought it worth while looking after a profit rent of 17*l.* a year.

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In *Re*  
COLTHURST.  
Judgment.

The almost inevitable result of such a state of things, is that which has taken place; there was no desire or demand for renewal on either side. The owner of the fee had also the actual possession and enjoyment of the lands under a perpetual right of renewal, and paid a profit rent to the first lessee. He was perfectly content. The lessee was also content. He got all he was entitled to when he received the profit rent. If he had made a demand for a renewal fine, a similar claim would have been made upon himself, and this would have led to nothing but expense. In this way I see why there has been an acquiescence for more than half a century, and a cessation from all demands for thirty years, from the time Sir *John Colthurst* acquired the fee. I must suppose that there was some reason why no party ever made a demand. A renewal was never asked for, because it would have been a mere empty form upon paper without gain to any person. There was no matter of account to be settled. This will explain the fact of the parties remaining so long quiescent, and I believe they were not desirous of mooted the point, as there was not a legal title. The parties may have thought that the point was not decided; for I cannot consider *Wilson v. St. Leger*, a positive decision on the question, as that case went off on an award; and in *Morton v. Archbold*, there was a difference of opinion between the Lord Chancellor and the Master of the Rolls. In the concluding paragraph of the judgment in *Morton v. Archbold* (which is not very distinct, for it appears to be but a short note), I perceive that Lord *Manners* thought that there was a distinction between that case and



1842.  
 In Re  
 COLTHURST.  
 Judgment.

*Wilson v. St. Leger.* The parties, therefore, probably thought, that it was doubtful what their rights in point of law might be, and acted upon the understanding, that no demand should be made on either side. On that supposition the whole case is reconciled.

This case, however, now comes before me in an extraordinary shape. In 1837, *Hannah Gillman*, and others, presented a petition in the matter of the minors, which gave rise to the order, against which the present appeal has been presented. By that petition, they asked this Court to direct a reference to the Master, to inquire and report, if it would be for the interest of the minor, to renew the original lease to *Gillman*, and if so, upon what terms; and to accept a renewal of the under-lease, which had vested in them. I was not aware, when this case was first before me, that the order made on that petition was the second order; but I find, that in 1835, the *Gillmans* presented a petition to the same effect. Now by this petition it appears, that the *Gillmans* asked only for an account of the renewal fines and septennial fines; they were then labouring under a great difficulty of title, because their immediate lessor, *Ware*, was not before the Court, and on that occasion they obtained a reference to ascertain what had become of *Ware's* rights, and in whom they were vested, and under what circumstances. Looking at the original demand, if the case had turned upon that first order, and the Master had found that all the penal fines were payable, I should have been bound, having regard to both form and merits, to have decided that the parties never meant to set up a claim of the nature found to exist by the Master; I should have been compelled to overrule the Master's report as an excess of his authority. He was not directed to inquire into the penal

finer, but only to make the same inquiries as to the under-lease, which he was to make as to the original lease.

1842.  
In Re  
COLTHURST.  
Judgment.

In 1837, the *Gillmans* having in the interval acquired the interest of Mr. *Ware*, presented a second petition, not setting up any new right, or pretending to have any additional claim, but throwing into the petition a prayer, that an account might be taken of the penal rents. I think those words ambiguous, but when I look at the orders, I am clearly of opinion, that what they asked was denied. I must read the orders together, and I am of opinion that all they obtained by the last order, was the right to charge the minor with the same amount of fines, as they were themselves liable to under their original claim. The last clause of the order is conclusive; it directs, that one set of renewal and septennial fines should be set off against the other, and not one word is said about penal rents. The order, which is the guide, applies only to the fines, and is altogether silent as to the penal rent. It is quite clear that the parties did not obtain an order to entitle them to this claim. The Master had no warrant to make the charge, and was wrong in so doing. I must, therefore, overrule the report, and send it back to him to be reviewed. I have gone fully into the circumstances of the case, to show the impression on my mind. I am here to guard the interest of minors, and I shall not allow parties, under the pretence of benefiting a minor, to acquire a benefit for themselves at his expense. In this case, had the petition come before me originally, with a full knowledge of the facts, I should have refused the prayer of it. As the matter stands at present, I give the *Gillmans* the full benefit of the order they have obtained. If they feel themselves aggrieved, let them file a bill, and I shall have the facts of the case fully before me.

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 In Re  
 COLTHURST.  
 Judgment.

I do not observe that the Master of the Rolls gave any opinion upon the point of the excess of authority by the Master.

I cannot mention the name of the late Master of the Rolls, without expressing my deep sympathy with the general feeling of sorrow for his loss. By his kind disposition and pleasing manners, he won the regard of those over whom he presided; while his great attainments as a lawyer, his practical knowledge, his untiring industry, and his earnest desire to promote the true ends of justice, commanded the respect of all. In him the judicial bench has lost one of its brightest ornaments. He has imposed a heavy task on his successor; but although that successor may not hope—and I dare aver does not desire—to excel the eminent person whose loss we deplore, yet by a rare union of the like qualities, he will, I doubt not, follow in his steps, and emulate his great example.

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BATT v. CUTHBERTSON.

Nov. 5.

Upon an application to draw money out of Court, which has been the subject of settlement, the instrument itself must be produced in Court.

MR. GAYER, for the Plaintiffs, in this cause, moved that out of the sum of 733*l.* 2*s.* 8*d.* stock, to the credit of the cause, a sum of 250*l.* should be paid over to them. The principal sum had been the subject of a settlement of the 19th of May, 1828, but the deed was not in Court.

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THE LORD CHANCELLOR :—

It is impossible for me to hear the application without having the deed produced. I must see the instrument itself, before I can venture thus to decide upon the rights of the parties, and give away any portion of this fund.

I remember a case which occurred before Lord *Eldon*, where, upon an application like the present, an attested copy of the settlement was produced, and subsequently it was discovered upon examination of the original, that in the copy the clause against anticipation, which was in the original, had been omitted, and this clause happened to be the very important part of the instrument; I must, therefore, refuse the motion for the present.

1842.  
BATT  
v.  
CUTHBERTSON  
Judgment.

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HALL v. HILL.

THIS cause came on to be heard upon report and merits, and for further directions. The principal facts of the case, and the proceedings at the former hearing, have been already reported(a).

Nov. 7.  
Incumbrancers  
are entitled to  
their costs out  
of the fund ac-  
cording to their  
respective pri-  
orities, and not  
against the  
Plaintiff in the  
first instance.

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Mr. *Warren*, for *Anne Connellan*, one of the Defendants, applied for her costs to be paid by the Plaintiff, the Plaintiff to have them over against the fund. It appeared, that *Anne Connellan* was the representative of a trustee, in whom were vested the legal estates in two old terms for years, affecting the lands in the pleadings mentioned, created by indentures made in the years 1737, and 1759, to secure certain charges. The trusts of these terms had been spent. The suit was instituted to carry into execution the trusts of a will, made in the year 1837, and the Plaintiff having prayed a sale, *Anne Connellan* had been made a party, for the purpose of making title to a purchaser under the decree.

Mr. Serjeant *Warren*, *amicus curiæ*, referred to the cases of *Hickson v. Byrne*(b), and *Taylor v. Gorman*(c).

(a) Ante, vol. i. p. 94.

(b) 2 Molloy, 473.

(c) 1 Drury & Walsh, 235 (n).

1842.

THE LORD CHANCELLOR :—

HALL

v.

HILL.

*Judgment.*

The practice is, that all incumbrancers are to have their costs out of the fund according to the priority of their respective incumbrances. It does not make any difference, that the Defendant here is not entitled to any charge, and does not derive any actual benefit from the decree. She has an incumbrance against the estate, and is not a declared trustee. If the fund should turn out to be defective, the question as to this Defendant's rights against the Plaintiff may then arise, and she will be at liberty to apply to the Court.

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GARRETT NAGLE by THOMAS CUSSEN, his next Friend;

*Plaintiff.*

ROBERT BAYLOR, LEWIS MINCHIN, HENRY WHITE, JOHN

J. TANGNEY, and ELLEN, his Wife;

*Defendants.*Nos. 9, 10, 11,  
14.

Principles upon which the Court acts in suits to set aside deeds, on the ground of the intoxication of the grantor.

*Semble*, if a vendor, who has a right upon equitable grounds, to impeach the sale, not only neglects to do so, but by the subsequent execution of other deeds, adopts the sale, and acts upon it as binding, he cannot afterwards impeach the title of equitable mortgagees, who, subsequently to this act, advanced their money *bona fide* and without notice, to the purchaser.

THE bill in this case was filed to set aside two indentures executed by *William Nagle*, the Plaintiff's father, in favour of a person named *John W. Anderson*. One of these indentures was a lease of certain impropriate tithes, granted in 1825, in consideration of 150*l.* and a rent of 60*l.* per annum. The other was a conveyance of the reversion of the same tithes, and also of a fee simple estate, in consideration of 1800*l.* and an annuity of 323*l.* 1*s.* 7*d.* per annum, for the life of *William Nagle*, the grantee. Of the 1800*l.* only 400*l.* was actually paid at the time; the residue was secured by *Anderson's* bond. The date of the latter instrument was the 20th of January, 1827.

*John W. Anderson*, died in the year 1840, and the Defendant *Robert Baylor*, was entitled to all his estate in the premises comprised in the indentures of 1825 and 1827, as assignee under a commission of bankruptcy, issued against *J. W. Anderson*, previously to his decease.

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NAGLE  
v.  
BAYLOR.  
Statement.

*Lewis Minchin* was a mortgage and judgment creditor of *William Nagle*. The date of the mortgage was prior to those of the indentures of 1825 and 1827, but the judgments were all recovered subsequently to those dates, and *Minchin* claimed to be entitled to tack the judgments to his mortgage, as against the Plaintiff. The Defendant, *Henry White*, was entitled to two mortgages of the premises, under deeds executed by *John W. Anderson* for valuable consideration.

*William Nagle* died in 1833, and his widow, the Defendant *Ellen*, subsequently intermarried with the Defendant, *John J. Tangney*. They were brought before the Court inasmuch as part of the sum of 1800*l.* the consideration for the deed of 1827, was settled upon the lady.

The circumstances of the case, and the evidence, sufficiently appear in the judgment of the Lord Chancellor.

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Mr. *Brooke*, Mr. *Collins*, and Mr. *Deasy*, for the Plaintiff.

Argument.

Mr. Serjeant *Warren*, Mr. *Pigot*, and Mr. *Orpen*, for the Defendant, *Henry White*.

The *Solicitor-General*, Mr. *Moore*, Mr. *Reeves*, and Mr. *O'Flanagan*, for the other Defendants.

The following cases were referred to during the progress

1842. of the argument, viz.: *Casborne v. Scarfe*(a); *Cholmondeley v. Clinton*(b); *Jones v. Jones*(c); *Dearle v. Hall*(d);  
 NAGLE v. *Foster v. Blackstone*(e); *George v. Milbanke*(f); *Daubeny*  
 BAYLOR. *v. Cockburn*(g); *Shine v. Gough*(h); *Blake v. Sir Edward*  
 Argument. *Hungerford*(i); *How v. Weldon*(k); *Mackreth v. Symmons*(l);  
*Whitfield v. Fausset*(m); *Dunbar v. Tredennick*(n); and  
*Roche v. O'Brien*(o)

Nov. 14. THE LORD CHANCELLOR:—

Judgment.

The bill is filed by the heir at law of the late Mr. *William Nagle*, to set aside a lease of 1825, made by *Nagle to Anderson*, whose assignee under a commission of bankruptcy is a Defendant, and also to set aside a conveyance of the fee in 1827, on the ground, that the same were obtained by imposition, fraud, and undue influence. The counsel for the Plaintiff opened a case, in support of which, no evidence was given, viz.—a statement of value made by *Anderson*, after the purchase, and sales by *Nagle*, of part of the annuity granted by *Anderson to Nagle*, as part of the consideration for the fee, to a third person, and of the residue of the annuity to Mr. *Anderson* himself, for an inadequate consideration. It was stated by the Plaintiff's counsel, that this was as fraudulent a case as ever appeared in a court of justice, and that there could hardly be an instance of an estate being sold for a more inadequate consideration.

(a) 1 Atk. 603.

(b) 2 Jac. & W. 1, 178.

(c) 8 Sim. 633.

(d) 3 Russ. 1.

(e) 1 Mylne & K. 297.

(f) 9 Ves. 190.

(g) 1 Mer. 626, 638.

(h) 1 Ball & B. 436, 446.

(i) Prec. Ch. 158.

(k) 2 Ves. Sen. 516.

(l) 15 Ves. 329.

(m) 1 Ves. Sen. 387.

(n) 2 Ball & B. 304.

(o) 1 Ball & B. 330.

The main grounds, upon which it was sought to impeach the deeds were, first generally, the want of capacity in the seller, who was proved to be an habitual drunkard, frequently associating with low persons, and women of abandoned character. Secondly, that he was very drunk when he executed the conveyance of the fee, and that he was entrapped into taking a journey to Cork, where the deeds were executed, in order that he might be deprived of the aid of any third person. Thirdly, that the consideration for the lease and the conveyance was grossly inadequate, and such as shocked the conscience. Fourthly, as to the two sets of mortgagees before the Court, it was said there was notice by the publication of an advertisement in a local newspaper, for which one of the mortgagees was a subscriber, and that so far as they claimed only an equitable estate, the Plaintiff had also an equitable estate, and between equities, the elder title must prevail, according to the rule *qui prior est tempore potior est jure*. The Defendants entered into none but formal evidence, the Plaintiffs examined several witnesses. The Plaintiffs read the evidence only of two witnesses, speaking generally to *Nagle's* habits and capacity, and one of them deposing generally to the value of the property, and of three witnesses to the circumstances attending the execution of the conveyance, viz. *Anderson's* coachman, *Nagle's* groom, and a clerk in a coach office at Cork, and of a witness, the brother of *Nagle's* wife, who takes up the account of *Nagle's* conduct the day after the execution of the deeds; but as the Plaintiff's counsel gave up the evidence of this witness, I need not make any observation upon it. The Defendants themselves read the depositions of the Plaintiff's principal witnesses, consisting of several solicitors and an agent.

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NAGLE

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BAYLOR.

Judgment.



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NAGLE

v.

BAYLOR.

*Judgment.*

Habitual drunkenness and low habits are clearly proved against *Nagle*, but no witness proves that he was not capable of acting rightly when sober; it is proved that he was a spendthrift, but at the same time, when sober, he knew the value of money; he knew, as one of the Plaintiff's witnesses expressed it, the difference between a pound and a shilling, but would as soon spend one as the other. In considering by-and-by the acts done by *Nagle*, I think it will satisfactorily appear, that when sober, he was, throughout the period assigned to these transactions, perfectly competent to manage his affairs and to enter into contracts; and one of the Plaintiff's own witnesses proves, that after his marriage, which was subsequent to the sale of his estate, he sometimes associated with people of his own rank. There is, I think, no evidence that *Nagle* had been rendered incapable, through previous debauchery, of entering into solemn contracts. *Barry*, who had been his agent, one of the Plaintiff's witnesses, whose evidence was read by the Defendants, states, that he does not think that *Nagle* could be tricked out of his property by any man. As to drunkenness itself, I entirely subscribe to Sir *William Grant's* view of it in *Cooke v. Clayworth*(a). He thought that a Court of Equity ought not to give its assistance to a person who had obtained an agreement or deed from another in a state of intoxication; and on the other hand, ought not to assist a person to get rid of any agreement or deed, merely on the ground of his having been intoxicated at the time. He said, merely upon that ground; as if there was, as Lord *Hardwicke* expressed it in *Cory v. Cory*(b), any unfair advantage made of his situation, or as Sir *Joseph Jekyll* said

(a) 18 Ves. 12.

(b) 1 Ves. Sen. 19.

in *Johnson v. Medlicott*(a), any contrivance or management to draw him into drink, he might be a proper object of relief in a court of equity. As to that extreme state of intoxication which deprives a man of his reason, he apprehended, that even at law it would invalidate a deed obtained from him while in that condition.

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NAGLE  
v.  
BAYLOR.  
Judgment.

I must first dispose of the question as to the lease of 1825, as to which the Plaintiff did not read any evidence. That lease is wholly unimpeached, for although the Plaintiff, in reply, relied upon the evidence as to value, given by one of his witnesses, whose depositions were read by the Defendants, yet it is much too vague to be entitled to any weight, and, therefore, as far as regards that lease, the bill must be dismissed with costs against all parties.

In regard to the conveyance of 1827, *Anderson's* coachman proves that he was sent by his master, on the 26th of January, to *Nagle*, to desire him to go over to *Anderson's* that evening or the next morning, and his master told him not to mention his errand to any one. The next morning *Nagle* came over, the carriage was ordered round, the blinds were ordered to be closed, and *Anderson* and *Nagle* proceeded beyond Fermoy, where they met *Nagle's* groom with post horses, and the coachman was sent back with his horses, and desired not to mention who was in the carriage. The groom then takes up the story. He got upon the box, and they proceeded to Cork. The blinds were still closed, but whether they were closed all the way, does not appear; if they were the common sun blinds, as every one knows, they do not exclude the outside view from the persons in

(a) 3 P. Wms. 130 (n).

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 v.  
 BAYLOR.  
 Judgment.

the carriage. I think this evidence proves that *Anderson* did not desire to be seen in company with *Nagle*, or to have it known at the moment that he had taken him in his carriage to Cork ; but there was an end of all concealment when they reached Cork. I cannot attach much weight to this circumstance standing alone. The object of the interrogatories manifestly was, to elicit statements, that *Nagle* was drunk when he started, that he was inveigled to *Anderson's*, forced into the carriage, kept concealed there, and supplied by *Anderson* with liquor whilst there, and neither the coachman, nor the groom, appears to have been an unwilling witness. The coachman saw *Nagle* at the stables, on the morning of the 27th. *Nagle* told him he was to breakfast with *Anderson*. He says no persuasion was used to get *Nagle* into the carriage. *Nagle* told him they were going to Cork ; so that *Nagle* knew where he was going. He says, he did not see *Nagle* get any drink on the carriage, and that he should rather say *Nagle* was sober than drunk, when he spoke to him at the stables, and that he cannot say whether *Nagle* was drunk or sober, when he entered the carriage. I may observe, that there is no evidence that *Nagle* had been drinking that morning. *Nagle's* groom deposes, that his master was not supplied with drink, either on the road to town (Cork), or whilst with *Anderson* at the coach office there. His master sent him on a message. He, like the coachman, is very cautious : he cannot say whether *Nagle* was drunk or sober from the time he left Fermoy, until he parted with him in the street. He saw nothing taken to him, nor did he observe any thing particular about him after leaving the coach office. This is not evidence to enable a Court of Equity to set aside a conveyance on the ground of intoxication, but the concluding words of the deposition satisfy my mind, that *Nagle* was not

intoxicated. The groom says, if he were (had been) drunk, I should not have left him as I did, to go on the message. The groom saw no more of his master for some weeks, as the latter did not meet him at the place appointed, and did not return home for three weeks.

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v.  
BAYLOR.  
Judgment.

The coachman's evidence carries the case further; he went to Cork upon a pony of his master's, after he returned home with the carriage horses. In the evening he gave *Nagle* some whiskey, at his request; he afterwards went to dine with him at his request; first asking him was his job done, and was he full of money. He said he had plenty of notes, but no silver. After dinner, they went to get a saddle for the pony, which the coachman had brought over to Cork: they then returned and drank a good deal of punch. I may observe, that the dinner was after the execution of the conveyance, that is proved by the possession, by *Nagle*, of money, and by his ownership of the pony, which he induced *Anderson* to give to him as a sort of make weight after the conveyance was executed. The coachman does not state that *Nagle* was intoxicated, and he, like the groom, concludes with an important statement, that *Nagle* often spoke to him of his bargain for his property with *Anderson*; but it is not stated that *Nagle* ever complained of it, and I may observe, in passing, that the only witness, who makes a statement to that effect, was the one whose evidence the Plaintiff abandoned. Up to this point, there is nothing to impeach the conveyance upon the ground of intoxication.

There were three deeds, and they were all attested by the same two witnesses, who are both dead. One of them was a clerk, of the name of *Campbell*. A witness in this

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Judgment.

cause, *Campbell's* brother, was, he says, also present. The conveyance, he says, was executed between nine and ten o'clock at night. In his mind *Nagle* was *very drunk* at the execution of the deed. He had a bottle of whiskey in his pocket, and wanted the witness's brother to take some of it. He thinks *Nagle* was in no state to make a bargain, or transfer property of any kind; nor did he think him at the time properly sensible of what he was about to do. He says, he kept up his excitement by drinking out of the bottle. But he claimed the pony mare of *Anderson*, and after a short time, the latter said he should have the mare, and *Nagle's* man took the mare.

Now all the persons present with this witness are dead, principals as well as witnesses: he himself was not called upon to attest the deeds, he describes himself as of the age of twenty-five years and upwards, and if so, he was about ten years of age when the transaction took place. The Plaintiff's counsel say, he is forty-five, and that it is usual to swear without regard to truth as to age. I cannot so consider the evidence of a witness: as there is no one to contradict him, I must try the accuracy of his evidence by the best test in my power. Fifteen years had elapsed since the transaction. He speaks only of one deed, which he says he saw signed, and which *Anderson* took out of his pocket. He heard it called a deed of sale; no money passed. Now there were three large deeds, and they were all attested by the same witnesses, and were clearly executed at the same time. His memory, therefore, fails him in this respect. He says no money passed, but *Nagle* told the coachman he had plenty of notes, but no silver; and the next morning, notwithstanding the company in which he was found associating, he had in his possession at least 260*l.*, and the

bond for 1400*l*. No doubt, therefore, his memory failed him upon this point. He also is probably wrong, as the Plaintiff's counsel seemed to admit, as to the time of execution, for it is clear that *Nagle* and the coachman dined together after the deeds were executed, and then went to the saddler's before they drank the punch ; and in the month of January, it is not probable that they would have gone to the saddler's at so late an hour as must have arrived, if the deeds were not executed until between nine and ten o'clock. He says that *Nagle's* groom took the mare, but that, I apprehend, was not until the next day, as the groom did not see his master from the time he sent him upon the message, until he returned home. If *Nagle* was *very drunk* when he executed the conveyance, he could hardly have received the coachman to dinner, without his noticing it, much less have gone to the saddler's : the punch was not drunk until afterwards ; but still the coachman, the Plaintiff's witness, does not corroborate this witness's statement as to the intoxication. I have looked at *Nagle's* signature to the deeds, and it is not that of a drunken man ; and upon comparing it with his signature to other deeds, I find no difference between them. I am, therefore, clearly of opinion, that there is no evidence of intoxication upon which I can act. It is clear that *Nagle* was not drawn into drink by *Anderson* ; whether he took advantage of him, if he really was in a state of intoxication, I shall now consider.

It was argued, that *Nagle* was taken to Cork out of the way of his friends, and that the haste proves fraud. But *Nagle* left the coach office by himself, he had his own servant with him and several times looked in at the office, inquiring for *Anderson* ; in fact they were inquiring for each other, which proves that he was at perfect liberty ;

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 Judgment.

and it would have been easier to have procured his execution of the deeds, at *Anderson's* house, than at Cork. It is stated in one of the answers, that *Anderson* and *Nagle* went to Cork to consult counsel, which is not improbable. There must have been previous treaty, for the deeds, which are complicated, are in regular form, and were engrossed ready for execution. It might be, that *Anderson* went there to get the money, which was to be paid down. The marriage settlement of *Nagle* was indeed suddenly agreed upon and prepared very shortly after this conveyance; but upon that deed the Plaintiff relies. There is no such weight due to these allegations, as can impeach a conveyance in this Court.

It is then said, that the price was grossly inadequate; but that is not proved. The evidence is altogether vague. It consists mainly of the opinion of a gentleman, of the value of the property, and what he would now give for it, if he wanted such a property. But the tithes were already bound by the lease of 1825, and there were leases of some of the lands, which had been granted before the sale; and upon one of which a large fine had been received, and of these the witness takes no account; nor in truth is there any thing which amounts to sufficient evidence of value. Part of the consideration was an annuity to be paid by the purchaser to the seller for his life, and it no where appears, what was the value of the life. Mr. *Franks*, a solicitor of eminence, was examined by the Plaintiff: He had been concerned upon the occasion of the mortgage in 1826 for 1800*l.*, and, upon that occasion, value as well as title must have been considered; yet he, so competent to speak on the subject, is not asked what the value was. *Barry*, another of the Plaintiff's witnesses, and whose evidence, as well as

*Franks's*, was read by the Defendants, states, that whilst *Nagle* lived, *Anderson* lost 80*l.* a year. The Plaintiff's counsel attempted to controvert this statement, but there is not evidence which satisfies me that it is wrong. The sale was, in effect, a sale of the reversion. Upon this ground it was said, that the bond for the 1400*l.* was a fraud, but as the money carried interest at five per cent., and principal and interest were paid, I do not think that argument can be maintained.

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BAYLOR.  
Judgment.

Having disposed of the main objections of the Plaintiff, I shall proceed to consider the real nature of the transactions. *Nagle* was not a man unused to enter into contracts, or to execute deeds, or in want of friends or legal advisers. In 1825, he executed a lease of his tithes to *Anderson*, for 150*l.* fine, and a rent of 60*l.* In 1823, and 1825, he executed leases for fines of parts of his lands, and no attempt was ever made to impeach these leases. But in a transaction with other persons, he thought he had been imposed upon, and he filed a bill in 1825, to be relieved, and the Plaintiff's counsel vouched for the respectability of Mr. *Franks*, *Nagle's* solicitor. In order to obtain an injunction, it was necessary *Nagle* should raise money to pay into Court, and accordingly a mortgage in fee was made to Mr. *Carter*, for 1800*l.*, and that sum was paid into Court. All this was under the direction of Mr. *Franks*, and no complaint has ever been made of this mortgage. The three deeds, which were executed on the sale, in January, 1827, were prepared with care and skill, and Mr. *Franks*, in his deposition for the Plaintiff, but read by the Defendants, says, he was the relation and solicitor of *Nagle*: he does not remember the conveyance of 1827, but he has no doubt if he did not prepare it, he must have been consulted, and have perused the



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v.

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*Judgment.*

deed. One of the three deeds transferred to *Anderson*, who bought subject to the mortgage for 1800*L.*, the rights of *Nagle* in the Chancery suit. After the sale, the suit was compromised, and a consent was, on the 7th of August, 1827, signed by the Plaintiff, *Nagle*, and the Defendants in the suit, agreeing to a certain division of the fund in Court, under which *Anderson* obtained a large sum; and on the 16th of that month, the consent was followed by an order of the Court. Mr. *Franks's* costs were provided for and paid, and these acts show, that at the time when all the circumstances were known (for here time has obscured many points, but thrown a light upon none), the sale in January was deliberately acted upon by *Nagle*, and his solicitor Mr. *Franks*: that was the period to impeach the sale, when *Anderson* claimed to receive several hundreds of pounds in right of his purchase. In the mean time, viz. in February, 1827, *Nagle* married, and by his marriage settlement, deliberately settled the 1400*L.*, and interest secured by the bond of *Anderson*, with power to enter up judgment for the benefit of himself and his wife; but he did not include his life annuity. Upon that important occasion, the sale was recognized and acted upon. Neither the Defendants in the suit, nor the wife, nor her relations, nor Mr. *Franks*, considered *Nagle* incompetent to compromise the suit, or to contract marriage and make a settlement on his wife. In November in the same year, a deed was executed by *Nagle* and his wife, and her father, who was a trustee in the settlement. By this deed, 700*L.* (part of the 1400*L.*) to which the wife became entitled, upon surviving her husband, was secured by mortgage of the estate sold to *Anderson*, and the equity of redemption was reserved to him, and covenants were accepted from him, that he had an unimpeachable estate in fee. *Bullen*, the solicitor of *Nagle*, prepared the

deed, and was one of the witnesses to it. In his evidence for the Plaintiff, read by the Defendants, he states that both parties often spoke to him upon the subject of the purchase. Here then was again a deliberate recognition of the sale with the aid of another solicitor, and another proof of *Nagle's* competency. That mortgage was afterwards transferred to *Minchin*, who paid off *Carter*, and obtained a transfer of his mortgage, and as he has the legal estate, and had no notice, the Plaintiff's counsel at last admitted, that his title could not be impeached. I think it clear, that the advertisement was not notice, as it is not brought home to the party, and, therefore, neither of the mortgagees had notice. In regard to the mortgagees under *Anderson*, I do not think that this case raises the question, which was much argued, viz. whether they have not the better right to call for the legal estate, and are, therefore, to be preferred, because I think, that if a seller who can, upon equitable grounds, impeach the sale, not only neglects to do so, but, by successive deeds, adopts the sale and acts upon it as binding, he cannot afterwards impeach the title of equitable mortgagees, *bona fide* and without notice, who advanced their money subsequently to his acts. But it is unnecessary to pursue this point. The whole of the purchase money was paid or secured as I have stated. The annuity was paid up to *Nagle's* death, who survived the sale six years, and he died without ever having complained of the transaction; and it was not until the second marriage of his widow, that this suit, which really is the suit of the second husband, was instituted. I am clearly of opinion, that the Plaintiff has altogether failed to sustain the grounds upon which it has been endeavoured to impeach the sale, and I, therefore, dismiss the bill, with costs against all parties, except that Mr. *Tangney* must pay the costs of himself and his wife.

1842.

NAGLE  
v.  
BAYLOR.  
Judgment.

1842.

## VESEY v. ELWOOD.

Nov. 12, 24.

The purchaser of an estate *pur autre vie*, sold under a decree of the Court of Chancery;—*Held*, not entitled to be discharged from his purchase, in a case in which the sole *cestui que vie* died, subsequently to the bidding, and before the Master's report could have been confirmed according to the practice of the Court.

THIS motion came on to be heard upon appeal from the decision of his Honor the Master of the Rolls. The facts of the case were as follows, viz. :

By the decree pronounced in the cause, the interest of the Defendant, the Rev. *Edward Elwood*, in certain lands, held by him for the life of a person named *John Irwin*, was directed to be sold. Accordingly on the 5th of May, 1842, it was set up for sale by the Master, and the Plaintiff, the Rev. *George Vesey*, was declared to be the highest bidder. On the 12th of May, Mr. *Vesey* lodged in Court the one-fourth of the purchase-money; and on the 16th of May he obtained the usual order to confirm the sale, unless cause to the contrary should be shown within eight days after service. The order was served on the following day.

*John Irwin*, the *cestui que vie*, died on the 23rd of May. On the 28th of the same month Mr. *Vesey* caused notice to be duly served of an application to the Master of the Rolls, to be discharged from the purchase. The application was refused by his Honor; and Mr. *Vesey* appealed.

The judgment of the Master of Rolls will be found reported in Messrs. *Flanagan & Kelly's* Reports, page 668.

*Argument.*

The *Attorney-General* and Mr. *E. Galway* for the Appellant.

In sales under this Court, the contract is not complete until the Master's report has been confirmed, or at least until the period when it might have been confirmed, if the purchaser had acted with due diligence. In this case the

report could not have been made absolute, according to the rules of the Court, before the 27th of May, and before that day, the interest set up for sale had actually ceased to exist. This question lately came before the Court in *Vincent v. Going(a)*, a case less favourably circumstanced

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Argument.

(a) VINCENT v. GOING.

This was an appeal from a decision of his Honor, the Master of the Rolls.

It appeared, that under the decree in the cause, the life estate of the Defendant *Thomas Going*, in certain lands, in the county of Tipperary, was set up to be sold on the 16th of January, 1841, and a Mr. *Lloyd*, having bid 2000*l.*, was declared the purchaser. On the 18th, *Lloyd* (who, in point of fact, had bid on trust for his client, Mr. *C. Going*) obtained the Master's certificate of sale: on the 19th, he bespoke the certificate to lodge the one-fourth of the purchase money. On the 20th, he obtained the certificate; and on the 21st the one-fourth was lodged. On the 22nd, the rule *nisi*, to confirm the sale, was obtained, and on the 23rd, it was served upon the several parties in the cause. On the 3rd of February, the eight days limited by the rule expired; and on the following day, *Lloyd* bespoke the usual order, for liberty to lodge the remaining three-fourths of the purchase money; and on the 6th procured the certificate of the Accountant-General, for the purpose of making the lodgment.

(b) 2 Ves. 335.  
(c) 11 Ves. 559.

On the 12th of February, and before any further step was taken, Mr. *Thomas Going* died. The purchaser having refused to complete the purchase, an application was made at the Rolls, on the part of the Plaintiff, for a reference to the Master, to inquire and report, whether a good title could have been made to the life estate of Mr. *Thomas Going*, on the 3rd of February; the day on which the sale might have been confirmed; and at the same time, a cross application was made on the part of Mr. *Lloyd*, that he might be released from his bidding, and that the sum of 500*l.*, the one-fourth of his purchase money, should be repaid to him.

His Honor having decided against the purchaser, Mr. *Lloyd*, the present appeal was brought.

The judgment of the Master of the Rolls is reported in Messrs. *Flanagan & Kelly's Reports*, p. 250.

Mr. *T. B. C. Smith*, and Mr. *Collins*, for the Appellant.

Mr. *Blackburne* and Mr. *Rolleston*, *contra*.

The following cases were cited on the part of the Appellant; *Anon(b)*, *Ex parte Minor(c)*, *Gowan v. Tighe(d)*, *Savile v. Savile(e)*,

(d) Lloyd & G. temp. Plunket, 168.  
(e) 1 P. Wms. 745.

1841.  
June 19.  
Where a life estate was sold under a decree, and the tenant for life died subsequently to the lodgment of the one-fourth of the purchase money, and the obtaining of the rule *nisi*, but prior to the confirmation of the sale; Held, that the contract was not complete, until the sale was confirmed by the order of the Court, and that the purchaser was not bound to complete his purchase.

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Argument.

for the purchaser than the present; for there the *cestui que vie* did not die until more than eight days had elapsed sub-

*Vansittart v. Collier(a)*; and on the part of the Respondent, *Paine v. Meller(b)*, *Twigg v. Fifield(c)*, *Jackson v. Lever(d)*, *Anson v. Towgood(e)*, *In re Studdert(f)*, *Morimer v. Capper(g)*, *Hobhouse v. Hamilton(h)*, *Kirwan v. Blake(i)*, *Sewell v. Johnson(k)*, *Chillingworth v. Chillingworth(l)*, *Revell v. Hussey(m)*, *Ambrose v. Ambrose(n)*.  
THE LORD CHANCELLOR\*:—

I am relieved from much of the difficulty which I should otherwise have, in differing with his Honor, from the circumstance, that he has informed me, that the question is one upon which he entertained considerable doubts, and wishes that it should be reconsidered.—[His Lordship here recapitulated the dates of the several proceedings.]—Now the fact, which appears to me to be of vital consequence in the consideration of the question, is this, that the sale was not confirmed at the time when the life dropped; for I think upon the authorities, that the contract was not complete until the sale was confirmed by the order of the Court. This appears to have been

the opinion of Lord *Eldon* in *Ex parte Minor(o)*, and he there acted upon that opinion, and held the vendor liable to a loss, which had been occasioned by a fire; and there, even though a petition on the part of the purchaser to confirm the report, had been presented, before the fire occurred: and this was no light opinion of Lord *Eldon*, for it appears from the report, that on a subsequent day, and after he had made his decision, he again adverted to it and said, "that he finds it confirmed by what Lord *Hardwick* says in *The Attorney-General v. Day(p)*, as to carrying a purchase into execution against the representative after the report is confirmed." In *Jackson v. Lever(q)*, Lord *Thurlow* held the purchaser bound, though no payment on foot of the annuity had ever been made, because the contract for the purchase was complete before the dropping of the life. And so again in *Paine v. Meller(r)*, Lord *Eldon* reversed the decree of his predecessor, and held the purchaser bound, upon the ground that he

(a) 2 Sim. &amp; S. 608.

(b) 6 Ves. 349.

(c) 13 Ves. 517.

(d) 3 Bro. C. C. 604.

(e) 1 Jac. &amp; W. 637.

(f) 1 Hog. 320.

(g) 1 Bro. C. C. 156.

(h) 1 Hog. 401.

(i) 1 Hog. 151.

(k) Bunb. 76.

(l) 1 Sim. 291.

(m) 2 Ball. &amp; B. 280.

(n) 1 Cox, 194.

\* Lord *Plunket*.

(o) 11 Ves. 559.

(p) 1 Ves. Sen. 218, 221.

(q) 3 Bro. C. C. 604.

(r) 6 Ves. 349.

sequent to the order *nisi*. Lord *Plunket* decided, that the purchaser was not bound to complete his purchase, as the report had not been confirmed, reversing the decision of the Master of the Rolls(a). *Anson v. Towgood*(b) is not inconsistent, for there the sale was confirmed, and therefore, the effect of the decision was merely to prove, that when the contract has been completed, the effect of a complete contract will have relation back to the time of its inception. In *Ex parte Minor*(c), Lord *Eldon* held, that the bidder

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 v.  
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 Argument.

had accepted the title, before the premises, which were the subject of the purchase, had been consumed by the fire. *Twigg v. Field*(d), also before Lord *Eldon*, goes upon the same ground. So far Lord *Eldon* appears to have abided by the principle he laid down in *Ex parte Minor*. Then came the case of *Anson v. Towgood*(e). Now it is to be observed, that there was no decision there on the point. But Lord *Eldon* is reported to have said, "Can any thing turn upon the report not being confirmed? There was a case about a house being burned down before the confirmation of the report. But if the tenant for life had died the same night, must not the purchase-money have been paid? The report, I think, when confirmed, must have relation back to the purchase; and the contract, I apprehend, was made the moment that the purchaser's name was entered in the Master's book. If the purchaser had lived till the 6th of

July, and then died, he would have had nothing, if he is not entitled to these dividends." From this passage it is argued, that the confirmation is nothing, and that in point of fact, the party is bound from the period of his bidding. I cannot think Lord *Eldon* could have meant to lay this down; and more particularly after the opinion so deliberately expressed by his lordship in *Ex parte Minor*, and which case appears to have been in his recollection when giving his judgment in *Anson v. Towgood*. However, as I have already said, there was no decision there upon the point. I must always entertain a great distrust for any opinion of mine, which happens not to agree with that of so high an authority as his Honor; but in this case it seems to me, that the opinion I have arrived at does coincide with the authorities; and I must, therefore, reverse the order, which has been pronounced at the Rolls.

(a) Flan. & K. 250.

(b) 1 Jac. & W. 637.

(c) 11 Ves. 559.

(d) 13 Ves. 517.

(e) 1 Jac. & W. 637.

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Argument.

was not liable for a loss by fire, which occurred in the interim between the bidding and the confirmation. The cases of *Twigg v. Fifield*(a), and *Gowan v. Tighe*(b), are to the same effect. If the contract was complete, at the time the Master makes his report, and before confirmation, the purchaser would be entitled to the benefit of any increase in the value of the estate in the mean time; but suppose that in this case it was the reversion that had been the subject of the sale, and that in all other respects the circumstances and dates were the same, could Dr. Vessey have prevented parties from coming forward and depriving him of the benefit of the conversion of the reversionary interest into an estate in possession, by opening the biddings? *Ex parte Manning*(c). [THE LORD CHANCELLOR:—No one can dispute the right to open the biddings under such circumstances. It is not lost in consequence of the increased value of the estate]. In *Anonymous*(d), Lord Loughborough decided, that until confirmation of the report, the bidder cannot be compelled to complete the purchase; observing, that “as until confirmation, the purchaser is always liable to have the biddings opened; until that, *non constat* that he is the purchaser.”

Counsel did not appear on the other side.

Non. 24.

THE LORD CHANCELLOR:—

Judgment.

The point which I am called upon to decide is, whether a purchaser of a life interest can be released from his pur-

(a) 13 Ves. 517.

(c) 2 P. Wms. 410.

(b) Lloyd &amp; G. temp. Plunket,

(d) 2 Ves. 335.

chase, where the life drops before the report could have been confirmed absolute. I have to arbitrate between great authorities. The late Master of the Rolls in *Vincent v. Going*, where the report might have been confirmed absolute, held the purchaser bound; but the Chancellor, Lord *Plunket*, reversed his order, stating, that the Master of the Rolls entertained considerable doubt upon the question, and wished it to be reconsidered. However, upon this case coming before him under circumstances more favourable to the purchaser, the Master of the Rolls adhered to his former opinion.

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 v.  
 ELWOOD.  
 Judgment.

If this were the case of a sale out of Court, it would admit of no doubt. It is settled, but not without much previous conflict of opinion, that a purchaser in common cases is the owner of the estate from the time of the contract, and from that period must bear any loss, and is entitled to any benefit; and this applies as well to damage to the property, *e. g.* by fire, as to the interest in the property, for example, the death of the life for which it was holden. So as to profit, for an accidental improvement of the property would belong to the purchaser as well as an additional interest by the dropping of a life, where the reversion was the subject of the sale.

Now where the sale is by the Court, there is this anomaly, that the purchaser is not sure that he will remain the purchaser, although he has bought the property, until the report is confirmed absolutely, because, until then, the biddings may be opened. But if the sale be not disturbed, the purchaser is as much the purchaser of the estate from the time of the purchase in the Master's office as a purchaser out of Court is from the date of the contract. The



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*Judgment.*

Court having full power over the sales under its authority, deals with the question of interest and rents, and the payment of purchase-money, upon arbitrary principles, although now the rule is a fixed one. But that does not affect the operation of the sale in transferring the property in equity to a purchaser. He may sell or devise the property, and it will descend just as if he made the purchase from an individual. The right to open the biddings, therefore, does not affect the sale or the purchaser's right under it, unless it be exercised. The Court may disturb the purchaser, and he buys subject to that risk. But he has no option. He must complete his purchase, unless the biddings are opened, and has no corresponding right to be relieved from the purchase. From these premises it would seem to follow, that as to profit or loss, a purchaser under the Court ought to be bound by the same rules as a purchaser out of Court. But in *Ex parte Minor(a)*, where some buildings were burned down before the report was confirmed absolute, although a petition had been presented by the purchaser before the fire for that purpose, Lord *Eldon* allowed the purchaser a compensation for the loss. He said that the question must depend upon the point, what is the date and time of the contract at which it can be said to have been complete. Was the bidding in the Master's Office the contract between the Court and the bidder, or only an authority to the Master to tell the Court, that if the Court approves, the Court may make a contract with him upon the terms proposed. He reserved the question as one of the most considerable that had occurred for some time. He asked whether the purchaser, whilst in the Master's Office, had an insurable interest. Upon the case

[(a) 11 Ves. 559.]

again coming on, the compensation was allowed. Now I apprehend, that the contract does not date only from the confirmation of the Master's report, and that the purchaser has before that period an insurable interest; but as the Court has great power over these contracts, it might feel itself at liberty to throw a loss by fire, before the confirmation of the report, upon the sellers. In *Twigg v. Fifield*(a), Lord *Eldon* applied the same rule, as a reasonable one, in favour of a purchaser's right to an early payment of an annuity, which had been sold before the Master.

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 v.  
 ELWOOD.  
 Judgment.

In *Anson v. Towgood*(b), a Defendant purchased in Court his own life interest, and the report was confirmed, and the purchase-money paid: the question was, whether he was entitled to a payment of the dividends, which became due the day after the sale. Lord *Eldon* said, the rule of the Court in the purchase of a fee simple estate was to give the profits from the quarter-day preceding the payment of the purchase-money; but he asked was that so, where a man buys a life estate, which may not last five minutes. Could any thing turn upon the report not being confirmed? There was a case [*Ex parte Minor*] about a house being burned down before the confirmation of the report. But if the tenant for life had died the same night, must not the purchase-money have been paid? The report, he thought, when confirmed, must have relation back to the purchase; and the contract, he apprehended, was made the moment that the purchaser's name was entered in the Master's book. Now here Lord *Eldon* satisfactorily answered the question which he asked upon the first hearing of *Ex parte Minor*; and that answer, I apprehend,

(a) 13 Ves. 517.

(b) 1 Jac. & W. 637.

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v.

ELWOOD.

Judgment.

correctly stated the law of the Court. It is perfectly clear, that Lord *Eldon* thought, that the general rule and the exception established by *Ex parte Minor*, might well stand together. My noble and learned predecessor, in *Vincent v. Going*, observed, that there was no decision upon this point in *Anson v. Towgood*, and that he could not think that Lord *Eldon* could have meant to lay down, that the party is bound from the period of his bidding, more particularly after the opinion so deliberately expressed in *Ex parte Minor*, and which case appears to have been within his recollection when giving his judgment in *Anson v. Towgood*. But I say it with great deference, the ground of Lord *Eldon's* decision was there lation back, in such a case as this, to the time of the bidding; and he clearly intended to distinguish the two cases. It appears to me, that they are fairly distinguishable; and if not, that *Ex parte Minor* is the case which ought not to be followed.

In this case, although the life died before the contract, and before the report could be confirmed, yet the purchaser got what he purchased, viz., a life which might drop at any moment. If he had purchased a policy of assurance upon the life, which has dropped, he would have been entitled to the money at once. If he had bought a reversion expectant upon that life, he would have been entitled to the estate in possession, merely paying interest. That I think is settled, although there is much obscurity in the decided cases. In *Trefusis v. Lord Clinton*(a), Sir L. *Shadwell*, upon the sale of a reversion expectant upon a life-interest, ordered the purchaser to pay interest from the time of his purchase. The ground of the decision is ob-

(a) 2 Sim. 359.

vious. The purchaser's right in the cases I have put, depends upon principle. But as he is not entitled to equality, and bids, no doubt, less on that account in both of the cases which I have supposed, the report not being confirmed, the biddings might be, and as the property had greatly increased in value, doubtless would be opened by some person. But that depends upon the right subject to which he purchased. Treating *Ex parte Minor* as an authority, and I am not presuming to say it is not an authority, it would apply equally to a life interest, and therefore, if even my decision, following I believe the rule intended to have been laid down by Lord *Eldon*, be correct, yet if the life had not dropped, but any buildings on the property had been destroyed by fire before the confirmation of the report, the purchaser would have been entitled to compensation.

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Vesey  
v.  
Elwood.  
Judgment.

Upon the whole, as the purchaser bought an uncertain interest, he must abide by the loss from the dropping of the life. I shall, therefore, in effect affirm the order at the Rolls, by saying no rule; but as the parties opposing the purchaser did not choose to argue the question, and it was necessary to have it further considered, I shall not give any costs.

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*In Re* MURRAY, a Minor.

IN this case a petition had been presented on the part of the guardian of the person of the minor *John Murray*, praying that he might be directed to execute a deed, under

Nov. 12.

The Court has not jurisdiction to compel a male ward, with whom a marriage has been solemnized,

without its consent, on attaining his full age, to execute a settlement of his estate so as to exclude his wife from all participation in the property.

1842.

*In Re*  
*MURRAY.**Statement.*

the following circumstances. It appeared that the minor was entitled to a fee simple estate in the county of Antrim, producing a profit rent, amounting to nearly 200*l.* per annum. That sometime in the year 1841, a private marriage took place between the minor and Miss *Matilda Edmonstone*, which having been brought under the notice of the Court, an order was pronounced on the 17th of November, 1841, directing another marriage to be duly celebrated between the said parties, and referring it to the Master to settle and approve of a proper deed of settlement. On the 9th of June, 1842, the Master made his report, and thereby found, that the said parties had been duly remarried. That a scheme of a deed of settlement had been lodged in his office, and that he had approved of same. The proposed deed was to the following effect, that the estates should be conveyed to trustees, to the use of the minor *John Murray*, for life, with remainder to the children of the said *John*, by his present or any after taken wife, in such shares and proportions, as he should by deed or will appoint, and in default of appointment, to such children in equal shares as tenants in common, and if but one child, then the whole to such child; and if there should be no child, then the whole to the said *John*, absolutely. The deed contained the usual provisoes for survivorship in case of the death of any of the children, if males, under age, and if females, under age and unmarried: a clause for *ho'chpot*, in case of a partial appointment: trusts for the maintenance and education of the children, until their shares should become vested in possession; a power to *John Murray*, to charge the property with a jointure not exceeding 80*l.*, in favour of any after taken wife, and with a sum of 1000*l.* to enable him to raise a capital to embark in trade; and there were the usual powers

for changing and indemnifying the trustees. The deed contained no provision of any kind for the present wife.

1842.  
In Re  
MURRAY.  
Statement.

The petition, which was presented on the part of the guardian, prayed that the minor, *John Murray*, might be directed to execute the above settlement, when he should have attained his age.

Mr. *Hutton* in support of the petition.

Argument.

The Court has jurisdiction to make the order sought. The infant as well as the other parties implicated in the marriage, are in contempt; and this contempt, which lasts until it is purged, gives the Court jurisdiction to enforce a settlement as the condition of its pardon. In ordering a settlement of a ward's property, the Court is governed by two principles, first, the protection of the ward; and secondly, the punishment of the party, who has been guilty of the contempt, by marrying the ward, without the leave of the Court; and notwithstanding that the female ward, after she attains her full age, consents in open Court, to give the property to the husband, the Court will enforce the settlement, *Stackpoole v. Beaumont*(a), *In Re Donne*(b). This illustrates the power of the Court, for in such cases each party is *sui juris*. The disability of infancy has ceased, and that of coverture is avoided by the examination in Court. If a settlement can be enforced to punish a husband in the one case, it may so punish the wife in the other. *Edes v. Brereton*(c), *In Re Walker*(d), and *Chambers on Infancy*(e), were also referred to.

(a) 3 Ves. 98.

(d) Lloyd & G. temp. Sugden, 323.

(b) 2 Moll. 490.

(e) Page 240.

(c) West, 348.

1842.

*In Re*  
MURRAY.*Judgment.*

THE LORD CHANCELLOR :—

It would be impossible for me to make the order that is now sought. According to the statement in the petition, a male ward of the Court, without the consent of the Court, was drawn into a marriage with a person older than himself, and without any property ; but the ward had a real estate. The Court thinking that the marriage might be deemed doubtful, for the sake of morality, ordered it to be re-celebrated ; and now after the minor has thus entered into this solemn contract, it is sought to compel him to settle his own unincumbered real estate, not for the purpose of making a provision for his wife, but in order to exclude her, for whom he is bound to provide. As a binding marriage had been solemnized by the order of the Court, I should have supposed, that if any settlement had been directed by the Court, it would have been for the purpose of providing for the obligation, which the infant had thus contracted by the authority and under the direction of the Court. But instead of that, an application is now made, the object of which is, to exclude the wife from all participation in her husband's property, and to compel him to do an act, which would render it impossible for him to settle this estate as he may afterwards think proper, upon his wife and the children of the marriage. I recollect no case like this. The Court has no such jurisdiction. If a man improperly marry a female ward of this Court, the Court can protect her property, and prevent the husband from obtaining it for his own purposes. The Court would compel the husband to make a proper settlement of the property which he acquires by the marriage, for the benefit of the wife and children ; in such a case, the Court acts upon him, and will not permit him to take advantage of the contempt, of which he has been guilty. The present case is widely dif-

ferent, and were I to grant the order now sought, its effect would be to punish the husband, by compelling him to settle his property, for the purpose of punishing this lady, who no doubt acted improperly in marrying this young man, without the consent of the Court, but whose conduct otherwise, the Court has, in point of fact, thought it proper to sanction, by directing the re-solemnization of the marriage. This young man's property is unfettered, and I cannot, because he has married perhaps improvidently, take from him all dominion over his estates; I have no such jurisdiction, and must refuse the order now sought. I need not enter into the question, whether the Court could, in any view of the case, make such an order against an infant, which would be binding upon him when he attains his majority.

1842.  
In Re  
MURRAY.  
Judgment.

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SAUNDERS v. CRAMER.

LADY HANNAH TYNTE CALDWELL, being seised of an estate for life in certain lands situated in Ireland, with a general power of appointment, by indenture bearing

Nov. 15, 16.  
On the marriage of E. her grandmother, who was not under any legal or moral obligation to pro-

vide for her, signed the following memorandum, which had been written by her agent, at her request, viz.—Lady T., has desired C. to notify, that “she intends leaving E., 2000*l.*, to bear interest from her death, and to be secured by a bond. She has further desired C. to say, that this is the provision she intends making for E. on her intended marriage.” On the same day, C., the agent, wrote to the intended husband, S., stating that Lady T. intended to give 2000*l.*, at her death, and a house at Cheltenham. Subsequently C. wrote to Lady T., stating that S. wished to have the bond perfected, and also to have the house which Lady T. intended to give. This letter was read to Lady T., by E., and she then desired E. to keep it, adding, that it related to the business with S. The intended marriage was shortly afterwards solemnized in the life-time of the grandmother; who, however, had been for some time unable to attend to business, in consequence of indisposition, and who died without having executed either the bond for 2000*l.*, or a conveyance of the house at Cheltenham.

*Held*, that the memorandum, letters, and subsequent marriage, constituted a sufficient agreement within the Statute of Frauds: binding upon the representatives of Lady T., both as to the bond for 2000*l.*, and the house at Cheltenham.

Previously to the execution of the memorandum, Lady T. had bequeathed the house to C.:—*Quære*, whether under the new Statute of Wills (1 Vict. c. 26,) the contract rendered C. a trustee, or whether he took as devisee, subject to the contract?



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date the 11th of June, 1838, appointed the said lands to *John Thomas Cramer*, for a term of 500 years upon certain trusts; and amongst others, that the said *John T. Cramer* should, by sale or mortgage, raise the sum of 55,000*l.*, or so much thereof, as should be necessary for the purposes thereafter mentioned; and by said indenture, *Lady Tynte Caldwell* charged the lands with 5500*l.*, and thereby declared, that the said sum of 55,000*l.*, or so much thereof as might be necessary for the purpose, should go in aid of her personal estate, and should be applied in payment of the debts of the said *Lady Caldwell*, which should happen to be due at the time of her decease; and subject thereto, the said lands was settled upon *Joseph Pratt Tynte* for life, with remainder to his first and other sons in tail.

*Lady Tynte Caldwell*, was also entitled to absolute interests in four houses in Cheltenham, one of which was called "the Loretto House."

*Lady Caldwell* had three grand-daughters, the Misses *Tynte Pratt*, and it appeared, that she had frequently expressed an intention of providing for them upon their marriages. And upon the occasions of the marriages of Miss *Sara Tynte Pratt*, and Miss *Hannah Tynte Pratt*, she had given each a marriage portion of 10,000*l.*, and one of the houses at Cheltenham.

In the year 1839, *Robert Francis Saunders* proposed to marry Miss *Elizabeth Tynte Pratt*. This proposal was accepted, and the intended marriage obtained the sanction of *Lady Tynte Caldwell*, with whom Miss *Pratt* had for some years resided. Miss *Pratt's* father was alive, and she was in her own right entitled to a fortune of 10,000*l.*

During the negotiations which preceded the intended marriage, several interviews took place between Mr. *Saunders* and Lady *Tynte Caldwell*, and Mr. *Cramer*, who appeared to have been her land agent, and general man of business; and Mr. *Saunders* was given to understand that Lady *Caldwell* would liberally contribute to the marriage portion of Miss *Pratt*. Accordingly on the 3rd of December, 1839, Lady *Caldwell* sent for Mr. *Cramer*, and requested him to take down in writing, her instructions as to the provisions she intended to make for Miss *Pratt*, in reference to her intended marriage. On that occasion the following memorandum was written by Mr. *Cramer*, in the presence of Lady *Caldwell*, and by her directions, viz.:

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“Lady *Tynte Caldwell*, has desired Mr. *Cramer* to notify, that she intends leaving Miss *Pratt*, a sum of 2000*l.* to bear interest from her death, but not before, and to be secured by a bond. She has further desired Mr. *Cramer* to say, that this is the provision she intends making for Miss *Pratt*, on her intended marriage with Mr. *Saunders*. December 3rd, 1839.”

This memorandum was signed by Lady *Tynte Caldwell*, and subsequently, on the same day, Mr. *Cramer* wrote the following letter to Mr. *Saunders*:

“*Sallymount, December 3rd, 1839.*

“MY DEAR SIR,—I have been with Lady *Tynte* this afternoon, and she directed me to take down her intention in writing, relative to what she intends doing for Miss *Pratt*, which is giving to her 2000*l.* at her death, and her house at Cheltenham, called ‘*Loretto*.’ This she declares

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is the utmost to which she will go. I lose no time in giving you the earliest intimation of her intentions.

“ I remain, dear Sir, yours truly,

“ JOHN THOMAS CRAMER.

“ *Robert F. Saunders, Esq.*”

In reference to this letter, Mr. *Cramer* stated in his answer in the cause, that subsequently to Lady *Caldwell's* signature of the memorandum, she stated to him, that she intended to give Loretto House to Miss *Pratt* ; and that in consequence of that statement, he mentioned Loretto in the letter to Mr. *Saunders* ; but Mr. *Cramer* was unable to recollect whether the letter was written by the express directions of Lady *Caldwell*, or not.

On the 21st of December, 1839, Mr. *Cramer*, at the request of Mr. *Saunders*, wrote the following letter to Lady *Tynte Caldwell* :

“ *Rathmore, December 21st, 1839.*

“ DEAR MADAM,—Mr. *Saunders* wishes to have your bond perfected before you go to England, for the sum you mentioned you would settle on Miss *Pratt*, namely, for 2000*l.*, but it is not to bear interest until after your decease, and then to pay 5*l.* per centum : also, to have the house which you intend to give her at *Cheltenham*, called Loretto, but not the coach-house, stable, and premises, which belong to the adjoining house, and were only added to Loretto, to induce the gentleman who resides there, to take it. At the end of his lease, these offices must come back to their former premises. As this is a matter that must be arranged by your attorney, I have directed Mr. *Parker* to call on your Ladyship for instructions, but I presume Mr. *Saunders* will pay the costs. I consider it a fortunate cir-

cumstance, that you did not cross the water this weather,  
&c. &c.

“ JOHN THOMAS CRAMER.

“ *Lady Tynte Caldwell.*”

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It appeared from the evidence of a female servant, that *Lady Tynte Caldwell* was unwell, when she received this letter from Mr. *Cramer*, that it was opened in her presence, and read aloud for her by Miss *Pratt*, and that she then desired Miss *Pratt* to keep the letter, adding, that it related to the business with Mr. *Saunders*, and might be of use.

Some days subsequently, Mr. *Cramer* again wrote to Mr. *Saunders*, in these terms, viz. :

“ MY DEAR SIR,—In accordance with your letter of the 18th, I have written to Lady *Tynte*, and also to her law-agent, 10, Suffolk-street, concerning the bond for 2000*l.*, and Loretto, and recommend you to write to Mr. *Parker* on the subject, who, I am sure, will pay every attention to it.

“ I am, dear Sir, yours truly,

“ JOHN THOMAS CRAMER.”

In consequence of the state of Lady *Caldwell's* health, which altogether incapacitated her from attention to matters of business, no further steps were taken with reference either to the proposed bond for 2000*l.*, or the house at Cheltenham. However, in the month of February, 1840, the intended marriage between Mr. *Saunders* and Miss *Pratt* was solemnized. The settlement, which was executed upon that occasion, contained an agreement, that if any sum or sums of money should, at any time after the marriage, become payable to Miss *Pratt*, or to Mr. *Saun-*

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*ders* in her right, by virtue of any gift, legacy, or otherwise, such sum or sums should be vested in *Francis Green*, and *Fitzherbert Pratt*, as trustees upon the trusts of the said settlement. No express reference was made in any part of the deed of settlement to the proposed bond for 2000*l.*, or to Loretto House.

Lady *Tynte Caldwell* died in the month of March following; having previously made her will, which was dated the 12th of June, 1838, and thereby bequeathed her two undisposed of houses in Cheltenham, to Mr. *Cramer* and his heirs, upon trust, to sell them and apply the proceeds in payment of her debts, and the surplus, if any, in and towards the payment of the sum, which she had directed to be raised out of her estates in Ireland, by the deed of the 11th of June, 1838; and she appointed Mr. *Cramer*, and Sir *Josiah W. Hort*, her executors.

Under these circumstances, the present suit was instituted by Mr. and Mrs. *Saunders*, and the bill, after stating the foregoing facts, prayed, that the sum of 2000*l.* might be declared to be a debt due by Lady *Hannah Tynte Caldwell*, that it might be paid by *John Thomas Cramer* to the trustees of the settlement of February, 1840, and that the said *John T. Cramer* might be directed to convey to the said trustees the house in Cheltenham, called the Loretto.

Argument.

Mr. *Brooke*, Mr. *Brewster*, and Mr. *Wall*, for the Plaintiffs.

The only question in this case depends upon the second section of the Statute of Frauds(*a*), and the Plaintiffs sub-

(*a*) 7 Will. III. c. 12.

mit, that the memorandum of the 3rd of December, signed by Lady *Caldwell*, together with the subsequent correspondence between Mr. *Cramer*, her agent, and Mr. *Saunders*, were sufficient to satisfy the provisions of that section, and to constitute a valid agreement binding upon Lady *Tynte Caldwell*, and her representatives, and binding, not merely as to the bond for 2000*l.*, which alone is mentioned in the memorandum, but also as to the house at Cheltenham. It is perfectly settled, that a valid contract may be spelt out of the terms of an agreement; and there are many cases in which Courts of Equity have given their assistance to enforce the due performance of contracts similar to the present. In *Moore v. Hart*(*a*), a letter written by the lady's father to a third person, in which he promised to give his daughter a fortune of 1500*l.*, was held to constitute a valid agreement. So in *Wankford v. Fotherley*(*b*), a letter, written by the direction of the father, was held obligatory, and the decision of the Court of Chancery was affirmed upon appeal by the House of Lords. In *Otway v. Braithwaite*(*c*), an agreement made by deed poll, by an uncle in consideration of the marriage of his niece, and a settlement made on her by her husband, was decreed to be performed, and his personal estate was directed to be brought in aid of such agreement. *Bird v. Blossie*(*d*) is exactly in point; and *Douglas v. Vincent*(*e*), *Seagood v. Meale*(*f*), *Cokes v. Mascal*(*g*), where the agreement was never signed, all sustain the Plaintiff's case. In the present case there can be no doubt as to the 2000*l.*, the memorandum is actually signed by Lady *Tynte*, and then by her

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(*a*) 1 Vern. 110.

(*b*) 2 Vern. 322.

(*c*) Finch, 405.

(*d*) 2 Ventris, 361.

(*e*) 2 Vern. 201.

(*f*) Prec. Chan. 560.

(*g*) 2 Vern. 34.

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express directions communicated to the intended husband, Mr. *Saunders*, who acts upon the promise by his marriage with Miss *Pratt*. A verbal or express acceptance by Mr. *Saunders* of Lady *Tynte's* offer was unnecessary; the case of *Luders v. Anstey*(a) decided that point, where it was held, that if the solemnization of the marriage takes place immediately subsequent to the letter or promise, assent will be presumed, unless distinct and positive dissent can be proved. As to *Loretto* the case seems equally clear. Mr. *Cramer* was Lady *Tynte's* agent, and acted as such in this transaction. The letter of the 3rd of December was written by him in that character, and although there is not perhaps satisfactory evidence of an express direction to mention *Loretto* in that letter, there is of Lady *Tynte's* subsequent approval. In *Ex parte Minet*(b) and *Ex parte Gardom*(c), Lord *Eldon* seems to disapprove of the case of *Wain v. Warlters*(d), which alone could occasion any difficulty in the present case. These cases, with *Shortrede v. Cheek*(e), *Emmott v. Kearns*(f), and *Haigh v. Brooks*(g), also shew, that in order to sustain an agreement, it is not necessary to state upon the face of the document, the benefit or consideration moving to the party intended to be bound thereby, and that parol evidence may be resorted to, to prove that the act, the foundation of the agreement, has been performed.

In *Selby v. Selby*(h) the bill was dismissed, not on the ground that a letter or correspondence may not constitute a sufficient contract to bind the writer, but because the

(a) 4 Ves. 501.

(b) 14 Ves. 189.

(c) 15 Ves. 286.

(d) 5 East, 10.

(e) 1 Adol. &amp; E. 57.

(f) 5 Bing. N. C. 559.

(g) 10 Adol. &amp; E. 309.

(h) 3 Mer. 2.

signed within the Statute. In  
was not any written agree-

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for the Defendants,  
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the 11th of June,  
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Miss *Pratt* was not Lady *Tynte's* daughter; she  
had a large and independent fortune of her own; and her  
father was alive. The letters and memorandum amount  
to a mere vague statement of intention; and even supposing  
them to amount to an offer or a promise, there is no evidence  
of Mr. *Saunders'* acceptance of the offer, or that he married  
upon the faith of the promise. It has not been proved that  
he returned any answer to the letters; and the settlement  
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both the bond and the house. Now the case of *Kennedy*  
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the party who makes it, unless it is accepted within a  
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(a) 1 P. Wms. 618.

(d) 2 Vern. 201.

(b) 3 Mer. 441.

(e) 12 Ves. 67.

(c) 2 P. Wms. 64.



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(f) 5 Bing. N. C. 559.

(g) 10 Adol. & E. 309.

(h) 3 Mer. 2.

letter was not sufficiently signed within the Statute. In *Montacute v. Maxwell*(a) there was not any written agreement.

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Mr. John Brooke and Mr. Ormsby for the Defendants, *Joseph Pratt Tynte*, and his eldest son, who was a minor, and the first tenant in tail under the deed of the 11th of June, 1838, contended that an agreement within the Statute had not been shown. No consideration appears on the face of the instrument relied on by the Plaintiffs, and the case of *Wain v. Warlters* is still good law. Lady *Tynte* was not under any obligation to give Miss *Pratt* a marriage portion. Miss *Pratt* was not Lady *Tynte's* daughter; she had a large and independent fortune of her own; and her father was alive. The letters and memorandum amount to a mere vague statement of intention; and even supposing them to amount to an offer or a promise, there is no evidence of Mr. *Saunders'* acceptance of the offer, or that he married upon the faith of the promise. It has not been proved that he returned any answer to the letters; and the settlement executed prior to the marriage is altogether silent as to both the bond and the house. Now the case of *Kennedy v. Lee*(b) decides, that an offer will not be obligatory on the party who makes it, unless it is accepted within a reasonable time. In *Ayliffe v. Tracy*(c), a bill similar to the present was dismissed: and the same course was taken in *Douglas v. Vincent*(d). In *Randall v. Morgan*(e) a letter, like the present, was held not to create a debt against the testator's estate. As to Loretto-House Mr. *Cramer* does not by his answer admit, that he had Lady *Caldwell's*

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(d) 2 Vern. 201.

(b) 3 Mer. 441.

(e) 12 Ves. 67.

(c) 2 P. Wms. 64.

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authority for including it in his letter. If the agreement be held valid, its effect will be to revoke *pro tanto* Lady Caldwell's will, contrary to the provisions of the late Statute of Wills(a).

Mr. Serjeant *Warren* and Mr. *Bowen* for the Defendant  
 Mr. *Cramer*.

Judgment. THE LORD CHANCELLOR :—

Nov. 16. This case depends upon the second section of the Statute of Frauds, which embraces cases of agreements made upon consideration of marriage. It appears that the young lady was living with Lady *Tynte* her grandmother, who had already largely provided for her two sisters (independently of the portions given to them by their father, who was a gentleman of considerable property), by presenting them with 10,000*l.* each on their respective marriages.

A suitor for the hand of this young lady having presented himself in the person of Mr. *Saunders*, Lady *Tynte*, who seems to have been a woman conversant with business, and had at the time the aid of her land-agent (and indeed I may say he was her general agent), directed him to write the memorandum, a copy of which is now before me, which he accordingly did in her presence, and it was regularly signed by her. It is in these words :—

[Here the LORD CHANCELLOR read the memorandum.]

This arrangement was communicated, as it is admitted, to

(a) 1 Vict. c. 26, s. 20.

*Mr. Saunders.* Now without considering, for the present, whether this memorandum was or was not a binding contract on the alleged ground of its not having been accepted, let us look at its terms so far as relates to the 2000*l.*

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It is said, there is no consideration ; but beyond all doubt there is a consideration, and the most valuable of all considerations, namely, the intended marriage of the young lady with *Mr. Saunders*. The memorandum satisfies all the requisites of the Statute. It contains the names of the persons contracting, the amount of the obligation, the mode in which it was to be secured, the time at which it was to be paid, the period from which it was to bear interest, and the consideration for which it was given, namely, the marriage of Miss *Pratt* to *Mr. Saunders* ; anything more precise, or complying more exactly with every provision of the Statute of Frauds, I have never seen ; and it would be impossible that any contract could be prepared with more precision, or have more binding efficacy, provided it were acted upon. That is a distinct question, and which I shall advert to hereafter ; but as far as relates to the 2000*l.*, I have never seen an undertaking or agreement more precise. There is then a letter from *Mr. Cramer* himself, directed to *Mr. Saunders*, the intended husband of the young lady, who was then in Dublin.

[Here the LORD CHANCELLOR read the letter of the 3rd of December, 1839.]

Now this letter is written in sufficiently precise terms ; *Mr. Cramer* directly intimates, that Lady *Tynte* would not go further in her bounty, and this was said, probably with reference to the portions given to the sisters, as *Mr.*

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*Sanders* might have expected this young lady to have been as largely provided for by Lady *Tynte*, as the others had been. The object in writing this letter was to lose no time in ascertaining the views of Mr. *Sanders*, after he had been made acquainted with the expectations of the lady. Now it is clear, and has not been disputed, that a contract may be made out by a correspondence. From several letters between the parties, there may be extracted what will amount to an agreement; and an agreement so constituted will be carried into effect, in the same manner, as if it were regularly prepared in the form of articles. The proposal here constitutes an offer binding on the party. In the morning Lady *Tynte* said, "I will give 2000*l.* as a portion to my granddaughter;" and in the afternoon, her agent and man of business wrote to Mr. *Sanders* to say, we mean to enlarge our offer; we will not only give the 2000*l.* already mentioned, but also the Loretto-House, but we will go no further, and I wish to communicate this to you without loss of time. The other letters are only important as showing the fairness of the transaction, and the continued dealing of the parties upon foot of the offer. The letter from the agent of the grandmother explains what was meant by Loretto-House. It was intended to confine the gift to the house itself, and parcel or not parcel has always been a question open to parol evidence. The communication shows, that certain stables, which had been detached from the adjoining house, and temporarily annexed to Loretto-House, were not to be included in the contract, but were to be re-annexed to the adjoining house, on the termination of the lease.

Thus matters went on to the 22nd of December, and the arrangement was continued; but Mr. *Cramer*, wishing

to have the contract settled in due form, desired Mr. *Saunders* to communicate with the legal adviser of Lady *Tynte*, Mr. *Parker*, in order to have the bond duly prepared for the payment of the 2000*l.*, and to have the Loretto-House conveyed by the parties. All this shows that the offer was acted on and recognized. Then there is the evidence of the maid-servant that in point of fact the letter of the 21st of December, 1839, written by the agent of Lady *Tynte*, was read to that lady by the young lady herself, and that Lady *Tynte* desired her to keep the letter, as she said it related to the business with Mr. *Saunders*, and might be of use to them. A more deliberate offer and undertaking was never made.

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But then it is said, first, that to hold this a binding contract would be in contravention of the new Statute of Wills, and would amount to a virtual repeal of that Statute. Secondly, that Mr. *Cramer* had not sufficient authority to make the offer; and thirdly that the consideration does not appear upon the face of the agreement. As to the new Statute of Wills, it has nothing whatsoever to do with the case; the contract is just as effectual now, as it would have been before the Statute. What effect the contract has upon the will, whether it renders the devisee a trustee, or whether he takes as devisee, subject to the contract, is perhaps open to some doubt<sup>(a)</sup>; and I do not wish to be understood as expressing any opinion upon it; for that is not the question before me. If the contract is a binding one, it can be enforced against any party, in whom is vested the legal and beneficial interest in the property.

(a) See *Treatise on Vend. & Pur.* Ed. 10th. Vol. i. p. 301.

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With respect to the second question, was Mr. *Cramer* an agent authorized to write the letter? The counsel for the Defendants endeavoured to make out, that the agent repudiated, and had actually by his answer denied, his character of agent. But the circumstances leave no room for cavil or doubt. The first paper was written by Mr. *Cramer*, the agent of Lady *Tynte*, and signed and deliberately read by her; the second letter, which raised the question as to Loretto-House, was written entirely by *Cramer* himself, and he would be bound in a jury-box, if he denied his authority, to prove upon his oath, that he had taken upon himself to do an act, which it was not competent for him to do, and that he had stated what was entirely false, when he stated that Lady *Tynte* told him to put her intentions into writing, and to the effect, that she meant to give to her grandchild not only the 2000*l.*, but also Loretto-House. The third letter from Mr. *Cramer* shows, that the gift, and a gift it was, extended both to the 2000*l.* and the Loretto-House, and that one as well as the other was to be secured by bond. The mention of the bond shows, that it was not a mere undertaking, or proffer of something, not intended to be binding on the party making it, amounting only to what was called in the civil law an imperfect obligation, not enforceable in law, but of mere moral force; such an imperfect offer of the 2000*l.* and Loretto-House, might have been the meaning of the parties, leaving Lady *Tynte* at liberty to act upon her offer, or not, as she might subsequently feel disposed; but the execution of a bond would not have left it in the power of the grantor to revoke her gift; and the last letter shows, that the bond was to include both subjects, as well the 2000*l.*, as the Loretto-House. Therefore, she was bound to execute her con-

tract, and did not reserve to herself the right to retire from her obligation.

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As to the third objection, that the contract is not a binding one, the consideration not appearing upon the face of it, this point appears to be free from doubt. In the way the question was raised, I must say, that the Plaintiffs have unnecessarily thrown doubt upon their own case. *Wain v. Warlters*(a), and all that class of cases have been cited, with a view of showing that the Court is at liberty to receive parol evidence to supply the want of apparent consideration upon the face of a contract. But I need not decide that point, for the Plaintiffs are not driven to that: the correspondence makes out the Plaintiffs' case: the two papers read together, for so they must be taken as constituting a contract, and as such they must be stamped(b), the one written in the morning, and the other in the afternoon of the same day in relation to the marriage, amount to a contract, and supply the consideration—namely, that of marriage. It is true, that the Loretto-House is not mentioned in the letter signed by Lady Tynte, which contains the consideration, but it is mentioned with the 2000*l.* in the letter of the same day, signed by her agent, and these letters constitute but one contract, and not several contracts; and it is wholly indifferent that one letter is signed by the principal and the other by her agent: for the part of the agreement, signed by the agent, is just as operative as if signed by the principal: in law, therefore, she was bound by *all* the letters; and as they all make out but one contract, it cannot be material that the principal herself did not sign every one of the letters.

(a) 5 East, 10.

(b) See *Atherstone v. Bostock*, 2 Mann. & G. 511, 519.



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The only question which remains seems to be this—It is said, no doubt there was an offer to give a bond, which, if accepted, would have been binding; but that the gift was not accepted on the part of the husband. But what can amount to an acceptance of an offer, if this does not? A relation, not bound to give a shilling to a young lady, who had moreover a considerable portion of her own, presents her with a portion upon her marriage, and immediately afterwards, as quickly as the common forms of society will admit, the marriage takes place. Is not that an acceptance of the gift? If I offer to a man to sell my estate at a given price, it is a question for a jury, whether he accepted the offer or not. If he is not willing to take the estate, what is then the consequence; why I keep my estate, and he keeps his money; but here the knot, which is said to be indissoluble, is tied, and it is now said, that the party was not bound by her proposal, although the young lady was married. I am bound to infer in law that there was an acceptance, and the most solemn acceptance of the gift, by the subsequent marriage. The case is as plain a one as ever came before a court of justice; the contract is clearly operative within the Statute of Frauds; and the gift is followed by the only acceptance of it, which was necessary, namely, the marriage of the parties within due time.

Then it is said, why was not the bond executed? This is satisfactorily explained by the state of health of Lady *Tynte*, who yet might be well enough to attend to some business; what she said about what she would do on her return from England shows she did not think herself in any immediate danger; but in a very short period afterwards her death took place; and this may explain why the gift was not regularly secured by a bond. It is urged, however, that the

settlement, which was executed, does not deal with, or in any manner refer to, the Loretto-House; nor specifically with the 2000*l*. In the settlement there is a general covenant as to any sums of money, which should at any time, after the solemnization of the marriage, become payable to the lady, or her husband, “by virtue of any gift, legacy, or otherwise:” that the same should immediately become and be vested in the trustees upon the trusts of the settlement. A good reason has been assigned for the omission. In the first place, it was no part of the contract that it should be so settled: there was no stipulation that the 2000*l*., or the Loretto-House should be put into settlement. The suggestion at the bar is a very probable one, that the Plaintiff, Mr. *Saunders*, may have acted upon a very fair expectation, that Lady *Tynte* might by her will have bequeathed to this young lady something additional. He knew that Lady *Tynte* had given 10,000*l*. to each of the lady’s sisters; it was not necessary to go to the same extent with this lady, as it was in the case of her sisters, for she had a large independent fortune of her own. The husband may have been desirous to leave the matter open to Lady *Tynte*’s bounty: but that could not release her from her contract. Leaving it open to Lady *Tynte* to add, cannot be held to give her a power to subtract. Upon the whole I think that the Plaintiffs have made out their case by law, and that they are entitled to the relief prayed by the bill(*a*).

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 SAUNDERS  
*v.*  
 CRAMER.  
 Judgment.

(*a*) See *De Beil v. Thomson*, 3 Beav. 469.

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Nov. 14, 15,  
19.WRIXON *v.* VIZE.

In 1812, *W.*, who was entitled to a mortgage executed in the year 1802, filed a bill against *V.*, the mortgagor, to foreclose and sell; the mortgagor not having appeared, a decree upon sequestration was obtained against him. In 1830, the mortgagee having in the meantime died, and the suit having been revived by his representatives, a receiver was appointed over a portion of the mortgaged premises, the residue being at the time in the possession of an earlier creditor. In the year 1833, and during the progress of the account in the Master's Office, the mortgagor died intestate, and the suit was thereupon revived against his heir at law and personal representative. The heir at law appeared in the suit, but did not answer, and the report having been made up, in 1837 a decree for a sale was pronounced. On the investigation of the title it was discovered, that shortly before the filing of the bill in 1812, on the occasion of the marriage of *V.* the mortgagor, the equity of redemption in the mortgaged premises had been put into settlement, and limited to the mortgagor for life, with remainder to trustees for a term of years, to secure a jointure for his intended wife, and portions for the younger children of the marriage, with remainder to his first and other sons in tail male. This settlement, however, was never registered. In the month of May, 1838, the Plaintiffs filed the present supplemental bill against the parties claiming under the settlement, seeking the benefit of the decree and the former proceedings. The widow and younger children having set up as their defence the Statute of Limitations (3 & 4 Will. IV. c. 27):—

*Vize*, since deceased, and which had become vested in the Plaintiffs.

The circumstances of the case will be found detailed in

*Held*, that the possession of the mortgagor was not adverse to the mortgagee, when the Statute passed, the possession being partly in the Court and partly in the earlier incumbrancer; and that there was, therefore, nothing to take away from the mortgagee the benefit of the fifteenth section. A bill of foreclosure is not a suit in Equity for the recovery of the money charged upon the land, although it may lead to that; but it is, in effect, a suit to obtain the equity of redemption, which is, in the view of equity, an actual estate: *Quare*, therefore, as to *Dearman v. Wyche* (9 Simons, 570).

The right to file a bill of foreclosure, whether the mortgage be legal or equitable, falls within the twenty-fourth section of the 3 & 4 Will. IV. c. 27, and the 7 W. IV., & 1 Vict. c. 28; and the time is governed by the legal right of the party to bring an action, or if he have not the legal estate, by the right which he would have had, if his estate had been a legal instead of an equitable one.

Though the appointment of a receiver does not prevent the bar of the Statute from operating against a stranger, yet it will serve to prevent, at least in this Court, time from running in favour of a stranger to the suit.

A suit in a Court of Equity, properly instituted, will prevent time from running; and a Court of Law ought to act upon this principle, the same rule being prescribed by the Statute for both Courts. This Court, however, will protect its own jurisdiction, and will not permit a suitor to be evicted at law, who has an equitable right to sue for the land, and has filed his bill within the limit allowed, and duly pursued his remedy.

the report of the former hearing(a). The case now came before the Court, upon a petition of rehearing on the part of the widow and younger children of *John Vize*, the mortgagor, claiming under the settlement of 1812 ; and by their petition they prayed, that the bill should be dismissed, inasmuch as the right of the Plaintiffs to recover was barred by the Statute of Limitations, 3 & 4 Will. IV. c. 27, a period of twenty years from the date of the mortgage having elapsed prior to the institution of the suit, without any payment on account of principal or interest having been made on foot of the mortgage, or without any acknowledgment in writing having been given.

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 Statement.

In addition to the facts which have been already stated, the only material circumstances are the following : the Plaintiff's mortgage comprised two denominations of land, one called the lands of Droumduffe, which were in the occupation of the mortgagor, *Vize*; the other called the lands of Cottage, which were in the possession of a mortgage creditor, whose security was prior to that of the Plaintiffs. In the month of December, 1829, an order was obtained at the Rolls, on the application of the Plaintiffs, for a reference to the Master, to approve of a proper person to be receiver over the lands and premises in the possession of the Defendant *John Vize* ; and the Master having subsequently made his report, approving of Mr. *Robert Bailey*, as receiver, the same was confirmed on the 23rd of July, 1830 ; and on the 11th of September, 1830, *Bailey* accordingly executed the necessary securities, and as such receiver, entered into the receipt of the rents of the lands of Droum-

(a) Ante, vol. ii. p. 192.

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*Argument.*

diffe, and has continued in such possession from that period up to the present time.

Mr. Brooke, Mr. Pigot, and Mr. Haig, for the petitioners, the widow, and younger children.

The decree already pronounced in this cause cannot be supported, so far as the widow and younger children are concerned. They were not parties to the suit until the year 1838, when for the first time they were brought before the Court by a supplemental bill; and from that time only can the suit be considered as binding upon their rights. In *Long v. Burton*(a), Lord Hardwicke says, that when a bill is amended "the pendency of suit as to those parts, which are amended, is only from the time of the amendment;" and in *Plowden v. Thorpe*(b), Lord Cottenham, in reference to the Statute 2 & 3 Will. IV. c. 100, said, that "he should have found much difficulty in concurring in an opinion, that a Defendant, against whom no proceedings were instituted until January, 1835, could not claim the benefit of the third section, because the suit, to which he was made a Defendant by amendment, had been commenced against others within the prescribed time." The proceedings, it is true, were binding upon John Vize, the mortgagor; but these parties do not claim under him; their title is paramount, and, therefore, up to the year 1838, the proceedings in the suit were *res inter alios actæ*: and it has been recently decided in the Court of Queen's Bench, in *Hill v. Stawell*(c), that the proceedings in a cause in Chancery, for instance, a Master's report ascer-

(a) 2 Atk. 218.

(c) 2 Jebb &amp; S. 389.

(b) 7 Clarke &amp; F. 137, 164; West, 62.

taining the existence of a judgment debt, were not sufficient to save the bar of the Statute of Limitations in a suit at law by the conusee of the judgment against the conuzor. In this case, therefore, *primâ facie*, the Plaintiffs' right is barred as against the widow and younger children, by the operation of the fortieth section, there having been no payment of interest by those parties, nor any acknowledgment in writing signed by them or their agent, for a period of more than twenty years. The Plaintiffs will rely first upon the proceedings in the cause, and secondly, upon the fifteenth section of the Statute. The first of these has been already disposed of. As to the second, the section referred to, whereby an additional period of five years is given from the passing of the Act for commencing suits, only applies to the sections which precede it, and to cases where the possession has not been adverse at the time of the passing of the Act; but here the possession was adverse when the Act passed, according to the settled doctrine of Courts of Equity, where the mortgagor has been in possession for more than twenty years, and there has been no payment of interest or acknowledgment, *Trash v. White*(a), *Christophers v. Sparke*(b). The question of adverse possession is one of fact and when it arises at law, ought to be left to a jury, *Doe v. Wilkins*(c), *Doe v. Jauncey*(d). But in this case, even at law the possession was clearly adverse when the Statute came into operation; for upon the death of *John Vize*, the mortgagor, in 1833, the remainder to the trustees for securing the jointure and portions came into possession; and there has been no payment of interest shown to have been made by them, or any acknowledgment on

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(a) 3 Bro. C. C. 289.  
 (b) 2 Jac. & W. 223.

(c) 5 Nev. & M. 434.  
 (d) 8 Car. & P. 99.

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their part; and they were not made parties in the case until the year 1838. Now *Smartle v. Williams*(a) decides, that the entry of the heir of the mortgagor is tortious, and creates an adverse possession, upon the principle, that though the mortgagor was tenant at will to the mortgagee, yet his heir never was. Here then was no privity between the trustees and the mortgagee. In *Doe v. Barton*(b), a notice from a mortgagee to the tenants upon the mortgaged estate was held evidence to show, that the mortgagee treated the mortgagor as a trespasser; under all these circumstances, therefore, a case of adverse possession having been clearly established on the part of the petitioners, the fifteenth section is out of the question. The present case, therefore, must be governed by the fortieth section, which is complete in itself, and has no reference to any of the preceding sections. It will be contended, that if this be so, an inconsistency will follow, that the right of the Plaintiffs will be saved as against one party, while it is barred as against another. But such a state of things appears to have been contemplated in the Statute, which recognizes a severance of rights, and seems to provide for a right continuing against some, which is barred as against others. Thus in the fourteenth section, the acknowledgment to be given by the party in possession to the party entitled, and which by that section is declared to be equivalent to possession or receipt of rent, is only to have operation as against the party, who gives such acknowledgment. Again, the twenty-fifth section provides, that the right of the party beneficially entitled "shall be deemed to have accrued only as against a purchaser, and any person claiming through him," from the time of the purchase. So likewise, the

(a) 1 Salk. 245.

(b) 11 Adol. &amp; E. 307.

twenty-sixth section, which, providing for cases of concealed fraud, declares that though no time shall run whilst the fraud remains concealed, nevertheless allows an exception in favour of *bonâ fide* purchasers, who had not assisted in the commission of such fraud, and who did not know, and had no reason to believe, that any such fraud had been committed. And lastly, in the twenty-eighth section, in which the case of mortgagor and mortgagee are provided for, the Statute evidently contemplates the existence of the right of redemption against some of the mortgagees, while it is barred as against others. The Defendants' case then comes to this; here is a mortgage upwards of forty years old, upon foot of which there has been no payment of any part of the principal money, or the interest due thereon, or any acknowledgment in writing, for more than twenty years; the only circumstance to save the bar of the Statute being the decree in the suit, in which suit, the widow and younger children were not parties.

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The *Attorney-General*, Mr. Collins, and Mr. R. Martin, for the Plaintiffs.

It is clear that a payment of interest by *John Vize*, the mortgagor, or even an acknowledgment in writing signed by him, would have brought this case within the proviso in the fortieth section, and saved the Plaintiffs' rights even as against the present petitioners. This is established by *Lord St. John v. Boughton(a)*. Now although there has not been an actual payment of interest, or acknowledgment in writing, yet there has been what is tantamount to it, namely, a decree of this Court against the mortgagor for

(a) 9 Sim. 219.



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payment of the money, and after a solemn adjudication by a Court of justice, how is it possible to argue that the Statute can apply? In *The Attorney-General v. Day*(a), a decree, according to Lord *Hardwicke*, would be sufficient to remove the bar of the Statute of Frauds; and by parity of reasoning, a decree ought to have a like effect in the case of the Statute, with which the Court has now to deal. In *Farran v. Ottiwell*(b), Mr. Baron *Pennefather* observes, that "it is a startling proposition to say, that after a Court of Justice has declared and adjudged that a debt is unsatisfied, that the solemn judgment of the Court, given under such circumstances, is to be set at nought, and its adjudication to be treated as a nullity and of no effect." In a subsequent passage, the same learned Judge puts the very case now under discussion; he supposes a suit instituted within twenty years, for the purpose of raising the sum due on a mortgage; then a decree; and before any fruit can be had from this proceeding, an abatement, and thus a period of more than twenty years permitted to elapse from the date of the mortgage; on which, in this manner, no interest has been paid. He then says, "is the mortgagor to be protected by the Statute, and the mortgagee to lose his debt, although the justice of it was admitted by his debtor, and although the creditor had prosecuted his rights, obtained a decree of a competent tribunal for ascertaining and enforcing those rights, and was rendered unable to enforce that decree by matters, over which he had no control, the will of God, or perhaps the act or misconduct of the Defendant, in secretly conveying away the property." It may be said, that the decree in this case was only against a tenant for life; but

(a) 1 Ves. Sen. 218, 221.

(b) 2 Jebb &amp; S. 96; 1 Smythe, 297; 2 Ir. L. Rep. 110.

the principle of the cases, which were cited at the former hearing, *Knight v. Bampfeyld*(a), and *Needler v. Deeble*(b), establish this, that notwithstanding the limited interest of the mortgagor, the accounts taken in such a suit bind as well the mortgagor, as those claiming under him; and if so, a decree against such a party, establishing the right of the Plaintiffs, and ordering payment by the mortgagor, cannot be held to have more limited operation; more particularly in the present case, where the parties by omitting to register the settlement, under which their rights arise, or to inform the Plaintiffs of those rights, have created the very objection, and thus occasioned all the difficulty, upon which they now rely. If the settlement in this case shall be permitted to operate, it will in effect defeat the Registry Act(c). Now by the fifth section of that Statute, an unregistered instrument is declared to be fraudulent as against a registered one; and although in the cases, which have arisen upon this section, the conflict has been between prior and subsequent deeds, yet it has never been held, that the provision only refers to subsequent instruments, and there is nothing in the language of the section to suggest such a distinction. The case of *Hill v. Stawell*(d), which has been relied upon, turned altogether upon this, whether the report of the Master in a Chancery suit, finding no doubt the existence of a judgment debt, to which the Plaintiff was entitled, was such "an acknowledgment in writing" as the legislature contemplated. The Court of Queen's Bench most properly held not, and that the Master never could be said to be the agent of the parties interested in the report, or in the judgment, which was the subject matter of the re-

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(a) 1 Vern. 179.

(b) 1 Chan. Ca. 299.

(c) 6 Anne, c. 2.

(d) 2 Jebb & S. 389.

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port. There it did not even appear that the conusee of the judgment was any party to the suit, in which the Master's report was made. But how can that case have any application to the present; where there has been a solemn decree ascertaining the right of the Plaintiffs, and that too as against those Defendants, or at least as against the party, under whom they claim. Under these circumstances, the decree, which the Plaintiffs obtained, gave them a new "present right to receive the money secured" by the mortgage, and from that period only, the time began to run; and as twenty years have not elapsed, they are not within the operation of the fortieth section. In a very recent case before Vice-Chancellor *Knight Bruce, Coppin v. Gray*(a), the filing of a bill, without even the service of a subpoena, was held sufficient to prevent the Statute from running.

But independently of this, the Plaintiffs' right is clearly saved by the fifteenth section, which gives the party five years from the passing of the Act, to institute proceedings, in all cases where the possession was not then adverse. In this case the present bill has been filed within that time, and it is impossible for the Defendants successfully to contend, that there was an adverse possession against the Plaintiffs. In 1830, there was a receiver appointed in the cause, over a portion of these lands, at the instance of the Plaintiffs, and that receiver is in possession up to the present moment. How then can it be said, that there is an adverse possession in the Defendants, when, in point of fact, the possession is in the Court, or its officer? The Defendants here seek to limit the effect of the fifteenth section, and they argue, that it only applies to those clauses which

(a) 1 Younge &amp; C. C. C. 205.

precede it, and not to any of the subsequent sections. But this position cannot be supported; and *Doe v. Williams*(a) is a distinct authority for the Plaintiffs, in which case, though no interest had been paid upon a mortgage for more than twenty years, yet as the possession was not adverse, and as the heir of the mortgagee had brought his ejectment within the period given by the fifteenth section, the Court of Queen's Bench held, that the ejectment was not barred by the Statute, and that the heir was entitled to recover.

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Argument.

Mr. Pigot, in reply.

Assuming, for the sake of argument, that the possession was not adverse, nevertheless, the Plaintiffs' rights are not saved by the fifteenth section, for that section only applies to the previous clauses, whereas the present proceeding is governed by the fortieth section, upon which the fifteenth section has no operation. The language of the fifteenth section demonstrates this to be so: "Provided always, that when no such acknowledgment as aforesaid shall have been given," &c. These words connect this section with those which precede it, and prevent it from having any operation upon the fortieth section, unless the Court is prepared to construe the words "as aforesaid," to mean "as herein-after mentioned." The case of *Doe v. Williams*(a), and the doubts expressed by Mr. Justice Patteson, led to the enactment of the subsequent Statute, 7 Will. IV. & 1 Vict. c. 28, which provided that a payment of interest, which would have been sufficient within the fortieth section to save the right of the mortgagee to recover the

(a) 5 Adol. & E. 291.

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*Argument.*

principal sum secured by the mortgage, was equally efficacious to save the right to recover the land itself, which was the subject of the mortgage. This shows distinctly that the Act embraces two distinct objects, one, in which suits for the recovery of the land itself are provided for; the other, extending to suits for the recovery of the money charged upon land. These objects are distinct and unconnected: and the Statute 7 Will. IV. & 1 Vict. c. 28, and the reason for its enactment, show plainly, that the provisions of one branch of the Act cannot be drawn in aid of those of the other. The later Act contains no clause corresponding to the fifteenth section of the former Act, neither was it intended to remove any disability imposed by the fortieth section. The present suit is not within the second or third sections of the 3 & 4 Will. IV. c. 27; it is one to recover money charged upon land, and, therefore, falls within the fortieth section. This was so decided by the Vice-Chancellor of England, in *Dearman v. Wyche*(a). Unless, therefore, the Plaintiffs can bring themselves within the exceptions to that section, the bar of the Statute must prevail. How then do they seek to do this? It is admitted, that there has been no payment of either principal or interest, within twenty years; but it is contended, that the proceedings in the cause, in point of fact, amount to such an acknowledgment, as to satisfy the Statute. Where is the authority to sustain this position? It is clear that the Statute must receive the same construction in a Court of Equity as in law; and *Hill v. Stawell*(b) has decided, that a proceeding in Equity, in a suit in which the claimant is not a party, is not sufficient to keep the demand alive in favour of the party. How can a Court of Equity engraft upon this s

(a) 9 Sim. 570.

(b) 2 Jebb &amp; S. 389.

tion an additional exception, to those which are contained in it. The Statute 8 Geo. I. c. 4, did provide, that a judicial proceeding should be sufficient to save the bar of that Statute; but this has been omitted in the new Statute of Limitations; and in *Irwin v. Ormsby*(a), recently decided in the Court of Queen's Bench, Mr. Justice *Burton* states his opinion to be, "that the Statute 3 & 4 Will. IV. c. 27, s. 40, has in effect repealed that part of the 8 Geo. I. c. 4, which relates to a proceeding having been taken." This plainly shows, that it must have been the intention of the legislature, that the adjudication of a Court of Justice should not form any exception. In *Searle v. Colt*(b), the question was discussed, whether the grantee of an annuity charged on land, where the annuity had been punctually paid, could take proceedings to recover his annuity, after twenty years' possession and receipt of the rents and profits by the grantor, and no acknowledgment in writing of the grantee's title. The point was not determined, it is true, but the opinion of the learned Judge seems to have been, that as the grantee was never in possession, and, therefore, never could be said to have been dispossessed, consequently, the time must be considered to have run from the date of the annuity deed. As to the argument at the other side derived from the appointment of the receiver, it is quite settled that the appointment of a receiver does not, in any way, affect the rights of parties, or alter the possession of the estate. And in the recent case of *Harrison v. Duignan*(c), your Lordship held that the appointment of a receiver did not prevent the operation of the Statute.

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(a) 2 Jebb & S. 91.

(c) Ante, vol. ii. 295.

(b) 1 Younge & C. C. 36.

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Judgment.

Nov. 19.

THE LORD CHANCELLOR:—

The principal questions which were argued were, first, that here there was an adverse possession, and consequently, even if this case fell within the early sections of the Statute 3 & 4 Will. IV. c. 27, yet the right was barred by the twenty years, adverse possession, and it did not fall within the fifteenth section. Secondly, that if the possession was not adverse, yet the case fell within the fortieth section, which was not governed by the fifteenth, and that in this view also, the twenty years' possession was a bar.

Now although the conveyance was by way of mortgage, the right to bring an action, or make an entry, clearly falls within the second section. This admits of no doubt, and was decided by the case of *Doe v. Williams*(a); and unless the circumstances of this case raised an adverse possession, the possession of the mortgagor was not adverse to the mortgagee, and consequently the latter had five years to bring his action, or make his entry under the fifteenth section. In this case the remedy was pursued by a bill in this Court; and one question is, whether a bill for a foreclosure and sale falls within the first fifteen sections of the Act, or is wholly confined to the fortieth section. In the latter case there is no saving, and it is indifferent whether there was or not any adverse possession. In the former case the fifteenth section would save the right, if the possession was not adverse when the Act passed.

The second section having provided the twenty years as a limitation of time, the third section declares from what

(a) 5 Adol. &amp; E. 291.

period the time shall run in the several cases provided for. The only provision in this section which could apply to mortgages is the last part of it, viz., "when the person claiming, or the person, through whom he claims, shall have become entitled, by reason of any forfeiture, or breach of condition, then such right shall be deemed to have first accrued, when such forfeiture was incurred, or such condition broken." Mr. Justice *Patteson* in *Doe v. Williams*(a) observed, that if the third section was intended to comprehend the case of a mortgagee, it is very ill penned; and the fortieth section, if meant to apply to an action of ejectment, is still worse penned. It seems clear that the fortieth section does not apply to an ejectment. The doubt as to the third section was followed by the Statute 7 Will. IV. & 1 Vict. c. 28, by which power is given to any person entitled to or claiming under any mortgage of land (being land, within the definition of land in the first section of the former Act), to make an entry, or bring an action at law, or suit in Equity, to recover such land at any time within twenty years next after the last payment of any part of the principal money, or interest secured by such mortgage, although more than twenty years may have elapsed since the time, at which the right to make such entry, or bring such action, or suit in Equity, shall have first accrued. This Act, therefore, left the former Act still to point out when the right first accrued. By the fourteenth section of the first Act, an acknowledgment in writing, within the terms of that section, operates to make the time run only from that period; and the last Act gives a like effect to the payment of any part of the principal or interest. The first Act in the seventh section

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(a) 5 Adol. & E. 291.



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*Judgment.*

carefully provides, that no mortgagor shall be deemed tenant at will within the meaning of that clause.

The object of the legislature was to bind Courts of Equity by the rules of the Statute, and not to permit any longer simply to adopt the legislative measure by analogy. Accordingly the twenty-fourth section provides that no person, claiming any land in Equity, shall bring any suit to recover the same, but within the period, which, by virtue of the provisions before contained in the Statute, might have brought an action to recover the same, had he been entitled at law to such estate, interest, or claim in or to the same, as he shall claim therein in Equity. The twenty-eighth section provides expressly for the twenty years' possession by the mortgagee, without acknowledgment, being a bar to the mortgagor. Its connexion with the twenty-fourth section throws some light upon the intention of the Act. The twenty-fourth section is framed, for, as far as it bears on this case in which it would apply only to an equitable mortgagee, and give him the same right in Equity, as he would have had at law, if he were a legal mortgagee: but it is impossible to say that where a mortgagee is entitled to relief in Equity, he was not still to have the right within the time appointed, although he had a legal estate. An equitable mortgagee could clearly file a bill for a foreclosure and for the recovery of the estate under the twenty-fourth section: and as the intention seems clear, it is not difficult by a slight extension of construction to give the enlarged construction to the twenty-fourth section. The Statute 1 Vict. c. 28, appears to be a relative adoption of that construction, as it provides, that any person entitled to, or claiming under, any mortgage of land, may bring an action, or *suit in Equity*, to

such land, within the time thereby limited, although more than twenty years may have elapsed since the time, at which the right to bring such action, or *suit in Equity*, shall have first accrued. This must mean the right under the Statute 3 & 4 Will. IV., and consequently the legal and equitable rights under that Statute are treated as being co-extensive. It appears to me, therefore, that the right to file a bill of foreclosure, whether the Plaintiff's mortgage be a legal or an equitable one, falls within the twenty-fourth section of the Statute 3 & 4 Will. IV., and the 1 Vict. c. 28, and that the time is governed by the legal right of the party to bring an action; or if he have not the legal estate, by the right which he would have had, if his estate had been a legal instead of an equitable one. If the twenty-fourth section does not extend to a legal mortgage, then it is a *casus omissus* out of the Act; and as the general right of a mortgagee to file a bill of foreclosure is not taken away, Equity would once more adopt the legal rule by analogy.

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 Judgment.

The fortieth section is confined to actions and suits to recover the money secured by any mortgage, judgment, lien, or legacy: and the terms of that section may render it necessary to distinguish the cases within the early sections, and those subject to this; even where the fifteenth section has no operation. Now it is settled, that a mortgagee of the legal estate may recover the land under the second section, although the right to recover the money falls within the fortieth section. Why should not the same distinct rights belong to a mortgagee in equity? Why may he not, for example, file a bill of foreclosure in equity, to obtain the estate, discharged of all equity of redemption, or pursue his remedies at law or in equity for the money upon his bond

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or covenant. In *Dearman v. Wyche*(a), with which, when I had occasion to refer to it incidentally(b), I was inclined to concur, the Vice-Chancellor held, that a bill of foreclosure fell within the fortieth section, for it is in substance a suit in equity for recovery of the money. It is, the Court said a suit to recover money. But, with great respect I say it, cannot, upon consideration, take this view of the Statute. I think that the Statute provides a remedy for the recovery of the estate, and also a remedy for the recovery of the money; clearly so, when both are pursued, or one is pursued at law; and equally so, I think, when both the remedies are enforced, or only one of them is enforced in equity. A foreclosure suit may lead to the payment of the money. But this is optional with the Defendant. It cannot be enforced against him. The Plaintiff's right is simply to foreclose but he can only accomplish that upon a previous condition. The right of the Defendant to pay the money, whilst the only right of the Plaintiff is to the estate discharged of the equity, can hardly bring the case within the fortieth section, which applies strictly to an action or suit to recover the money secured by any mortgage. This right at law cannot be confounded with the right to recover the estate. Why should it in equity? It cannot, I think, be said, that the suit is not to recover the land, as it is already vested in him, for this expression would be strictly accurate, where the mortgage is of the equitable estate; and where the mortgage is a legal one, yet the suit is, in effect, to recover and obtain the equity of redemption, which is, in the view of equity, an actual estate.

Upon the whole, therefore, it appears to me, that the

(a) 9 Sim. 570.

(b) *Henry v. Smith*, vol. ii. p. 387.

Plaintiffs' right depends upon the early sections in the Statute 3 & 4 Will. IV., and consequently that they are within the savings of the fifteenth section, unless the possession was adverse. The mortgage in this case, was partly a legal one, and partly equitable, for over a portion of the estate there was a prior mortgage; but ultimately and pending the suit, the Plaintiffs have obtained the legal estate in that portion also.

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It was observed by the learned Judge, in *Dearman v. Wyche*, that it appeared to him, that the framers of this Statute of Will. IV., did not sufficiently consider what they were about, for although there was this restriction in the fortieth section, upon a suit to recover the money, yet if the decision in *Doe v. Williams* as to adverse possession were correct, and he confessed it appeared to him to be so, there was no commensurate restriction upon a corresponding suit for recovery of the land. This shows how narrow a construction the Statute received in that case; but my view seems to render all parts of it consistent. It probably escaped observation, that *Doe v. Williams* was decided upon the doctrine of non-adverse possession, before the Act, which brought that case within the saving of the fifteenth section. But by the general operation of the Act, independently of the fifteenth section, time runs, although the possession be not adverse; and, therefore, notwithstanding that there is some variance between the fortieth section of the Statute 3 & 4 Will. IV., and the second, third, and fourteenth sections of that Statute, and the 1 Vict. c. 28, yet there is the same restriction upon a suit for recovering the land, as there is upon a suit for recovery of the money.

The fifteenth section of the Statute 3 & 4 Will. IV. saves

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the right, where the possession or receipt of the profits shall not, at the passing of the Act, have been adverse to the right or title of the person, claiming to be entitled thereto. Now the bill was filed as far back as 1812; a decree on sequestration was obtained in 1813; a bill of supplement and revivor was filed in 1828, and in 1830 an order for a receiver was obtained, and the receiver collected some of the rents. As to another portion of the estate, it was held by a prior mortgagee. In February, 1831, there was another decree upon sequestration; and in February, 1833, *Vize* died. It is clear then, the possession or receipt of the profits was not adverse to the mortgagee when the Act passed, for the possession was partly in the Court, and partly in an earlier incumbrancer. There is nothing, therefore, to take away from the mortgagee the benefit of the fifteenth section.

The objection is made by the widow and younger children, claiming under the settlement of 1812; *Vize's* eldest son also claims under that settlement as a purchaser. The prior mortgage was registered, but the settlement was not, and *Vize's* heir having been brought before the Court, by bill of revivor, he entered an appearance, and then suffered, after a report, a decree for a sale to be taken against him in his absence, and he then brought in the deeds. This led to the discovery of the settlement; whereupon a bill of supplement was filed against the trustees of the settlement, and the widow and younger children. They, by their answer, set up the Statute of Limitations, but did not insist upon it at the hearing; and now this rehearing is had in order to try that defence. It is argued, that the Plaintiffs had no right to file such a bill under the twenty-fourth section at all, and no right to do so under the fortieth section, as twenty years had elapsed, and there was no saving. The Plaintiffs, it is

aid, must recover on the strength of their own case, and as the Statute bars the estate, as well as the remedy, they cannot rely upon the weakness of the Defendant's case. The Plaintiffs are disqualified to sue. But I have already expressed my opinion, that there was no adverse possession, and that the case falls within the fifteenth section.

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It was argued, that this case falls within the principle of my decision(a), that the appointment by this Court of a receiver does not prevent the bar under the Statute, *against* a stranger; but this is the converse of that case, and I shall consider myself perfectly consistent in holding, that the appointment of a receiver prevents, at least in this Court, time from running *in favour* of a stranger to the suit. The possession of the Court by its receiver, is the possession of the suitor, and how can time run against a person in possession. In the case of *Hill v. Stawell*(b), the creditor, who was held to be barred, was not a party to the suit. A suit in this Court, properly instituted, will prevent time from running; and a Court of Law, now that the same rule is prescribed by the Statute for both Courts, should, I conceive, act upon that principle; at all events, this Court will protect its own jurisdiction, and would not permit the suitor to be evicted at law, who had an equitable right to sue for the land, and had filed his bill within the limit allowed and duly pursued his remedy. I am not, however, called upon to decide that question, for here the Plaintiffs cannot be evicted at law.

It is said that the possession became adverse upon *Vize's*

(a) *Harrison v. Duignan*, vol. 11, p. 295. (b) 2 Jebb & S. 389.

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death, in 1833, as his death determined his tenancy at will but that tenancy had been long previously dissolved by the proceedings in this suit. The title of the widow and children is merely equitable, and was so far a concealed income in the balance, that the deed was not registered. It is not denied that the Plaintiff's right can be enforced against the real and personal representatives of Vize, the mortgagor. Can then the equitable claim of the widow and children, under the unregistered settlement, stand upon a higher ground; they undoubtedly have a better title, if they chose to avail themselves of it, and they have obtained relief under the decree already pronounced. They were never in possession, but they contend that the Plaintiffs have no right to file a bill against them. Be it so; then the Plaintiff's last bill must be dismissed against them. In what situation will they then stand? If they do not abandon their right, as they cannot proceed at law, not having the legal estate, they must file a bill. Now if they file a bill, claiming equity, they must offer to do equity. They being out of possession, and claiming only an equity, cannot pretend that they have under the Statutes of Limitation, acquired any legal estate, or any higher equity, than they had under the settlement. They cannot, therefore, obtain more than the Court gave them by the decree at the hearing. But if they succeeded in their present defence, the Court might be well warranted in proceeding in their voluntary absence, and excluding them from all relief. This defence has wholly failed, and I dismiss the petition of rehearing, with costs.

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## MARTYN v. BLAKE.

THIS case came before the Court upon exceptions to the Master's report. The facts appeared to be as follows: an indenture dated the 10th of September, 1800, made between *George Blake* of the one part, and *John Blake* of the other part; after reciting that by an indenture of lease of equal date, the Archbishop of *Tuam* had demised to *George Blake*, for the term of twenty-one years, certain messuages and lands in the county of Galway; and further reciting, that the said lease had been granted to *George Blake*, by the procurement of *John Blake*, upon certain trusts; it was enjoinessed and declared, that the said lease had been made, and should be held, upon trust, to apply the rents and profits, from the first instance, to the payment of the rent and renewal fines of the demised premises; then to pay the residue of a sum of 2650*l.* due by *John Blake* to *George Blake*; to pay the residue to *John Blake*, and his assigns, during his life; and after his decease, in the liquidation of the principal sum of 2650*l.* and the accruing interest. And the ultimate trust was declared to be for *John Blake* absolutely.

Subsequently, *John Blake* contracted debts, and charged the lands comprised in the lease of the 10th of September, 1800, with portions for his younger children; and by the terms of agreement, which bore date the 29th of January, 1808, he covenanted, that upon the marriage of his son

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The established rule of this Court (which however is only general and not inflexible) is, that interest cannot be recovered upon the arrears of an annuity.

But interest will be given upon the arrears of an annuity, where the person bound to pay it has been a party to the deed, by which it was created, and his acts disclose a system of gross misconduct, and opposition to the Court, for the purpose of evading payment.

Mere legal delay is not a sufficient ground to induce the Court to give interest: nor will a mere covenant to pay an annuity be sufficient to create an exception to the general rule.

But if there is a covenant to indemnify an annuitant against the effect of incum-

brances, and the perception of the annuity has been prevented by the claims of incumbrancers, and especially if this has occurred in consequence of the acts of the covenantor, and for damages under the covenant is clearly shown, and this Court, in order to prevent multiplicity of action, obtains jurisdiction to give interest upon the arrears of the annuity.



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*James Cuffe Blake*, he would assign to him the said lease subject to the incumbrances and conditions mentioned in the articles.

By indenture bearing date the 21st of December, 1842, made between *John Blake* of the first part; *James Cuffe Blake* of the second part; and *Netterville Blake* and *Martin Kirwan* of the third part; after reciting the articles of the 29th of January, 1808, and the subsequent marriage of *James C. Blake*, *John Blake* assigned his interest in the said lease to *Netterville Blake* and *Martin Kirwan*, upon the following trusts, viz.: first, to execute to *John Blake* the assignor, an under-lease of a part of the demised lands called Assulas, with a *toties quoties* covenant for renewal at a nominal rent of five shillings per annum; then upon trust to pay and keep down the rent and renewal fine payable to the Archbishop of Tuam; then to permit *John Blake* to receive out of the lands, excepting Assulas, an annuity of 100*l.* per annum for his life; and the declaration of this trust was immediately followed by a covenant on the part of *James Cuffe Blake*, to pay the annuity in two equal half-yearly payments, and by the usual power of distress given to annuitants. The next trust expressed by this deed was the payment of a jointure, to which *John Blake's* wife would become entitled in the event of his death in her life-time. Then there was a trust, out of the rents of the said lands, except Assulas, and subject to the annuity of 100*l.* per annum, or by sale or mortgage thereof, to discharge the debts specified in the deed, amongst which were included, the sum of 2650*l.* due to *George Blake*, and secured by the deed of 1800; and also certain charges then created for the benefit of the younger children of *John Blake*, and also to keep Assulas, and the said annuity

100*l.*, and *John Blake*, exonerated and indemnified from and against all debts and incumbrances theretofore, or which might thereafter be, contracted by *James Cuffe Blake*, which could in any manner affect the lands of Assulas, or the said annuity; and lastly, subject to the preceding trusts, upon trust for *James Cuffe Blake*, his executors, administrators, and assigns. This deed also contained covenants on the part of *James C. Blake*, to indemnify the lands of Assulas, the annuity of 100*l.* per annum, and *John Blake*, his heirs, executors, and administrators, against the incumbrances mentioned in the deed; and all other debts and incumbrances made, or to be made, by *James C. Blake*, and against all costs, charges, damages, and expenses in respect thereof, which *John Blake*, or his representatives, might sustain; and further to pay, or cause to be paid, or secure, or cause to be secured, the debts of *John Blake*, which were enumerated in the deed, and amongst which was specified *George Blake's* debt.

Immediately after the execution of this deed of 1808, *James Cuffe Blake*, under its provisions, entered into possession of the premises, except the lands of Assulas, in possession of which *John Blake* continued to the time of his decease. The annuity of 100*l.* was not paid; and in the year 1816, *John Blake* brought an action of covenant against *James C. Blake*, and recovered damages to a large amount. Previously in 1811, he had filed a bill in the Court of Chancery, in order to have the trusts of the deed of 1808 carried into execution; and in the month of May, 1816, he filed an amended bill. A decree upon sequestration was obtained against *James Cuffe Blake* in 1817; and subsequently, in the same year, a person named *Charles O'Malley*, was appointed receiver over the premises charged

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with the annuity of 100*l.* per annum. Upon the receiver's proceeding to serve the tenants in occupation of the lands with the usual order to pay their rents to him, *James Cuffe Blake* interfered, and instigated the tenants to such a violent resistance, that it was found impossible to effectuate service. Upon affidavits stating these facts, the receiver applied to the Court, and obtained a conditional order for an attachment against *James Cuffe Blake*, which was made absolute on the 13th of May, 1819.

*George Blake*, to whom the sum of 2650*l.* had been secured by the deed of 1800, died in the year 1813, leaving *John Martyn* his executor and personal representative: and the head-rent of the lands comprised in the lease of 1800 having fallen into arrear, *John Martyn* made an application to the Court in the cause of *Blake v. Blake*, to which he was a party Defendant; and an order, bearing date the 28th of February, 1820, was made to this effect, viz.: that the receiver should hand over to *Martyn* the balance then in his hands, that the receiver should be discharged, and that *Martyn* should enter into possession of the premises, without prejudice to the rights of the several parties.

*John Martyn* accordingly entered, and continued in possession for a short period, until he had received sufficient to discharge the then existing arrear of head-rent, when he permitted *James Cuffe Blake* to assume possession of the greater part of the lands. This possession continued until 1830. The lease during this period was from time to time renewed in the name of *John Martyn*, who appeared to have received sufficient out of the lands for the payment of renewal fines and interest upon the charge of 2650*l.*

*John Blake* died on the 1st of March, 1823, having by

his will appointed two of his daughters, *Anne Johnston* and *Julia Green*, and his wife *Mary Blake*, his executrixes. His will was proved in common form by the former; but *James Cuffe Blake* instituted a suit in the Prerogative Court, for the purpose of recalling the probate, which had been granted. This suit continued for five years, when, at length, in the year 1829, the probate was confirmed. Shortly afterwards, *Julia Green* and her husband filed a bill for the purpose of recovering the arrears of the annuity of 100*l.* per annum, secured to *John Blake* by the deed of 1808; but this suit was stayed by an order of the 13th of May, 1838, and liberty was given to the Plaintiffs, to prove their demand in the present suit.

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This suit was instituted in 1824 by *John Martyn*, for the purpose of raising the amount due upon foot of the charge of 2650*l.* In 1829 a receiver was appointed. In 1831 *James Cuffe Blake* died, and the suit having been revived against his representatives, a decree was pronounced on the 9th of May, 1838. By this decree, it was referred to the Master to take the usual accounts of incumbrances, prior to, or contemporaneous with, the Plaintiff's demand. Under this decree a charge was filed by the personal representatives of *John Blake*, and the Master reported, that there was due to them upon foot of the annuity of 100*l.* per annum, the sum of 630*l.* 15*s.* 5*d.* for nine years' arrears thereof, commencing the 1st of November, 1813, and ending the 1st of November, 1822, being the gale-day next preceding the death of *John Blake* the annuitant. To this report an exception was taken, upon the ground, that the Master ought to have found, that the representatives of *John Blake* were entitled to the further sum of 958*l.* 8*s.*, for interest upon said arrears, at the rate of five per cent.

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Mr. *Brooke*, Mr. *Berwick*, and Mr. *Molyneux* for the exception.

The old rule of this Court was to give interest upon the arrears of an annuity; and although this is no longer a general practice, still the Court will allow interest, when the party bound to pay the annuity has, by vexatious conduct upon his part, prevented the creditor from taking effectual steps to recover the arrears. In *Booth v. Leycester*(a), Lord *Langdale's* observations merely amount to this, that a special case is necessary, and that the party there had failed to make it. In the case of *Gay v. Cox*(b), which is referred to in the judgment in *Booth v. Leycester*, the annuitant, had been prevented from receiving the annuity in consequence of the appointment of receivers, at the instance of the party who was bound to pay it, and who himself obtained the rents, which should have been applied in keeping down the arrears of the annuity—a case strongly resembling the present—and the Court, under those circumstances, gave interest upon the arrears. In *Brown v. Newall*(c), Lord *Cottenham* says generally “where by the interposition of the Court to prevent an act rightfully or wrongfully intended, the Defendant has lost a remedy at law, the Court will give him a remedy equivalent to that, from which the interposition of the Court has debarred him;” and as an illustration of this proposition, he refers to *Morgan v. Morgan*(d) before Lord *Thurlow*, where it was decided, that this Court will give interest upon the arrears of an annuity, the recovery of which has been prevented by an injunction. *The Es*

(a) 1 Keen, 247; 3 Mylne & C. 459.

(b) 1 Ridg. P. C. 153.

(c) 2 Mylne & C. 558, 572.

(d) 2 Dick. 643.

*India Company v. Campion*(a) also supports this doctrine. In the present case the grantee of the annuity was unable to enforce its payment by proceedings at law, in consequence of the existence of a prior mortgage. When he applied for the assistance of this Court, he was also unsuccessful, for *James Cuffe Blake*, using the name, and acting in collusion with the prior mortgagee, obtained an order for the discharge of the receiver, who had been appointed at the instance of the annuitant. The collusion is apparent; for although the order directed the mortgagee himself to take possession, he does not do so, but *James C. Blake* is at once restored to his own possession.

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Independently of the effect of this interposition on the part of the Court in discharging the receiver, the deed, by which the annuity was granted, will enable the Court to give interest upon those arrears. *James C. Blake* thereby covenanted, not only to pay the annuity, but also to indemnify the annuitant, and the annuity, against all incumbrances, costs, charges, damages, and expenses, which might be incurred by reason of the prior incumbrances. Now it was in consequence of the prior mortgage, that the annuity was not paid; and the covenantor is consequently bound to make compensation for such non-payment. If an action at law were brought upon the covenant, the jury would give interest under the name of damages; and *Fergus v. Gore*(b) shows, that under a covenant of indemnity, this Court will allow whatever a jury would give in the shape of damages.

*Mr. Pigot* and *Mr. Concannon* for the report.

It is admitted, that a special case must be made to

(a) 11 Bligh, 158; 4 Clarke & F. 616. (b) 1 Sch. & L. 107.

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enable this Court to give interest upon the arrears of an annuity. Has then such a case been made out here? *Sterling v. Wynne*(a) shows, that the circumstance of an annuitant being unable to recover in consequence of the existence of a prior incumbrance is not sufficient; nor is delay in the prosecution of a creditor's suit, *Berrington v. Evans*(b). It is said, that there has been improper collusion between the prior incumbrancer, and the party bound to pay the annuity; but where are the facts which warrant such an inference? The order discharging the receiver was entirely the act of this Court. It was made, indeed, upon an application by the incumbrancer, but not according to the terms of that application. The possession of the lands was unsought for by the incumbrancer; who merely asked for the benefit of the receiver's possession; and although he afterwards suffered *James C. Blake* to go into possession, the annuitant might have again obtained a receiver, or brought the suit he had instituted to a hearing. It was his own default not to have taken either of these steps. The fund in this case will probably be deficient and consequently the contest is between creditors: *Hyde v. Price*(c), *Morris v. Dillingham*(d), *Franks v. Cooper*(e), *Mackworth v. Thomas*(f). Besides, some of these creditors are not before the Court.

As to the covenant upon which so much reliance has been placed, it is not more comprehensive in its terms than that in *Booth v. Leycester*, which was held insufficient to take that case out of the general rule. In *Rigb*

(a) 1 Jones, 51.

(b) Younge, 276.

(c) 8 Sim. 578.

(d) 2 Ves. Sen. 170.

(e) 4 Ves. 763.

(f) 5 Ves. 329.

v. *Macnamara*(a) there was a bond of indemnity to secure the obligee against all loss, damages, or expenses which he might happen to sustain by reason of his having joined in a security with the obligor, it was held, that interest could not be allowed upon sums paid by the obligee, in discharge of what was due for interest upon the original security. *Pulteney v. Warren*(b) and *Morgan v. Morgan*(c) were cases, where this Court, by injunction, directly interfered with the creditors' legal remedies; and in *Hickson v. Aylward*(d), Lord *Plunket* says, the proposition, "that in all cases where damages might be given at law, interest would be given in this Court," cannot be sustained.

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Mr. *Berwick* in reply.

*Anderson v. Dwyer*(e), *Aylmer v. Aylmer*(f), *Creuze v. Hunter*(g), and *Arnott v. Redfern*(h), were also cited.

Mr. *Monahan*, Mr. *H. G. Hughes*, Mr. *Patrick J. Blake*, Mr. *J. Robinson*, and Mr. *T. R. Henn*, appeared for different parties in the cause.

THE LORD CHANCELLOR:—

Judgment.

I will look into the authorities, to which I have been referred, before I finally dispose of this case. I do not at present feel much difficulty upon the question.

In 1800 a declaration of trust in the nature of a mortgage, was executed between *George Blake* and *John Blake*,

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| (a) 2 Cox, 415.                        | (e) 1 Sch. & L. 301. |
| (b) 6 Ves. 73.                         | (f) 1 Moll. 87.      |
| (c) 2 Dick. 643.                       | (g) 2 Ves. 157.      |
| (d) Lloyd & G. Ca. temp. Plunket, 231. | (h) 3 Bing. 353.     |



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the mortgagee and mortgagor; and by this deed it was arranged, that the rents and profits of the mortgaged premises (which consisted of a leasehold interest in some men-sal lands), should be applied first to the payment of the rent and renewal fines, necessary to be paid in order to preserve the interest in the lease; then in payment of the accruing interest upon the mortgage debt, and subject to those payments, the residue of the rents was to be paid to *John Blake*, the mortgagor, for his life; and after his decease to be applied in liquidation of the principal sum due on the foot of the mortgage. This arrangement was simple enough; but in the year 1808, a new arrangement was entered into between *John Blake* and his son *James Cuffe Blake*; and by the deed then executed, *John Blake* vested the estate in two trustees, upon trust, in the first place, to grant the father a lease of a particular portion of the lands, containing something more than 100 acres, at a nominal rent, then to keep down the head-rent and renewal fines, then to pay *John Blake* an annuity of 100*l.* per annum, and then to pay off with the surplus rents the corpus of certain debts specified in the deed, amongst which was included the mortgage of 1800. These trusts were followed by a special trust to indemnify the father, the portion of the lands to be demised to him, and his annuity of 100*l.* per annum, against the incumbrances specified therein, and all debts or incumbrances of *James Cuffe Blake* the son, and also against all costs, charges, damages, and expenses whatever, for or in respect thereof, or which the said *John Blake* should sustain, or be put to by reason thereof. The deed also contained a covenant by *James Cuffe Blake* to that effect; and the ultimate interest was vested in *James Cuffe Blake*, his executors, administrators, and assigns.

Now this deed of 1808 could not, of course, have the effect of binding the mortgagee of 1800, who was not a party to it, and who is now represented by the Plaintiff in this cause, to take his capital before the death of the mortgagor, the time provided by the deed of 1800, if he chose to object; the trusts are simple, and supposing that they had been properly executed, and that the prior mortgagee had not chosen to receive the corpus of his debt before the time agreed upon, the fund ought to have been reserved and laid by to accumulate as a capital, to discharge the mortgage at such time, as the same could be paid off. This was the plain duty of the trustee.

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According to this deed, however, *James Cuffe Blake* was not entitled to receive any thing out of the property until all the incumbrances were satisfied; it is perfectly clear, that he was not to receive a single shilling, not only until the interest upon the charges and renewal fines were paid, and the obligations of the lease performed, but until the annuity of 100*l.* a year should have been fully paid to his father, and all the incumbrances discharged.

It appears that the mortgagee entered under the deed of 1800 (I am not sure that the evidence is quite clear upon the point), but I must suppose that he did. There was no complaint of any arrear of interest at the time of the execution of the deed of 1808. The annuity provided for the father soon fell into arrear, and he filed a bill in the year 1811, for the purpose of raising the arrears. Amongst others, *James Cuffe Blake*, and the person entitled to the mortgage of 1800, were made parties to the suit. A decree upon sequestration was pronounced against the son, and the father having applied to the Court, obtained

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*Judgment.*

an order for the appointment of a receiver. On proceeding to carry the appointment under that order into effect, the most violent opposition was offered to the process of the Court by *James Cuffe Blake*, who was then in possession of the lands. It is not necessary to recapitulate the facts connected with his conduct upon that occasion; I shall merely observe that it was most painful to hear the evidence on the subject read. The result was, that an attachment was obtained against him, and the order was made absolute. *J. C. Blake* then discovered, that he could not any longer, by means of his own title, oppose his father's claim to the annuity, and that some other means must be resorted to. It is not necessary for me to consider what passed between him and the mortgagee. I need not suppose that he was the party, who put forward the mortgage upon that occasion, but the mortgagee, being a Defendant in the suit, or rather his representative, *Martyn* did come forward, and in the absence of *James Cuffe Blake* (not because he was not a party to the suit, not because he was not bound, but because he was in contempt and contumacious), asked that the receiver should remain in possession, but with a direction to pay over all the balances in his hands, in satisfaction of the interest on the mortgage, after the rent and renewal fines were paid. On that application the Court discharged the receiver, and put Mr. *Martyn* himself into possession, without prejudice to the rights of the other parties. Mr. *Martyn* thus went into possession of the lands with the knowledge of the Court, and under its order and sanction. His possession was, therefore, really the possession of the Court, and consequently he, and those acting under him, were subject to the authority of the Court, and the Court had a right to deal with his possession, as it thought fit.

In what manner then should *Martyn* have acted when in possession? He could not say he was merely dealing with the lands under the deed of 1800, for having impressed upon himself the character of mortgagee in possession, he was bound to act as such; if it was his wish only to receive the interest of his mortgage debt, he was not at liberty to pay himself that interest, and disregard the due application of the residue of the rents. He should have acted with regard to the residue, as if he were the mortgagor. He was bound to apply it in the discharge of all just and legitimate claims affecting it, and not of his own demand alone. If then he had so applied the rents, the case would have stood thus; looking to the deed of 1800, the surplus would have gone to the mortgagor, but the mortgagor had transferred the property upon the trusts of the deed of 1808, and this transfer was made with *Martyn's* knowledge; *Martyn* was, therefore, bound by those trusts, and was not at liberty to appropriate the surplus rents to any other purposes. Looking then to the deed of 1808, he was bound in the first instance to pay the rent and renewal fines; then the interest upon his own mortgage; then the annuity to the father; and then to provide for the corpus of the other debts, specified in the deed of 1808. Entering as he did, by the authority of the Court, in place of the receiver, it was his duty to apply the rents as that receiver would have done; but the moment after he obtained possession, he relinquished it. It was not a real transaction, it was a mere trick and contrivance. The Master has found, that with the exception of a short period, during which the receiver was in possession, from 1817 to 1821, *James Cuffe Blake* was in possession down to the year 1830. What then is the irresistible inference, but that *James Cuffe Blake* obtained this possession behind the back, and contrary to the intention of the Court, by the

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instrumentality of *Martyn*, the mortgagee? I ought to subject the mortgagee to all the liabilities which would have attached upon him, if he had continued in possession. If the receiver had remained in possession, the annuity would have been regularly paid, but he suffered *James Cuffe Blake* to receive all the rents, which should have gone to the payment of the annuity, and then to the reduction of the debts, which would have been long since extinguished, and a clear fund left for payment of the annuity.

These are not the only material circumstances of the case. Mr. *Blake* the father died in 1823, leaving a personal representative who proved his will; that personal representative might at once have come before this Court to assert his rights, which subsequent events show he was ready to do; but *James Cuffe Blake* began an opposition in the Ecclesiastical Court, which, after five years of frivolous and vexatious litigation, was declared to be such by the Court; but in this way, he prevented the creditors from getting anything out of the estate. If ever there was a case, not simply of vexation, but in which the party's acts disclose a system of gross misconduct, and direct opposition to the Court, for the purpose of evading payment of an obligation, to the creation of which he was himself a party, this is that case, and upon that ground alone I think the arrears of this annuity should bear interest.

The established rule of the Court, I agree (but it is not an inflexible, it is only a general rule), is, that interest cannot be recovered upon the arrears of an annuity, and it is clear that mere legal delay is no ground for giving interest. I remember a case before Sir *John Leach*, when Vice-Chancellor, which was well calculated to try the rule. A

party purchased an annuity created by a will, which had been regularly paid for many years; a bill was afterwards filed to have the accounts of the testator's estate taken, and the Court refused to allow any more payments to be made on foot of the annuity, until the accounts were taken, and ordered the fund to be paid into Court. I made a very reasonable motion upon the part of the purchaser of the annuity, that so much stock, as would be sufficient to answer his annuity, should be appropriated to that purpose, and invested, so that if ultimately it should appear that there was a clear fund, he, and not the residuary legatee, should have the benefit of the accumulations; but the application was refused, as being contrary to the practice of the Court. The consequence was, that the purchaser never got one shilling of interest upon the arrears of his annuity, pending the suit, although the person, under whom he derived, had been in receipt of the annuity for years, and although he was deprived of possession by the act of the Court, and the fund, out of which it was payable, was productive, so that the interest actually went into the pocket of the residuary legatee. I mention this to show how far the rule has gone(a).

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As to another part of the case, I may at once dispose of an objection, which has been made by Mr. *Pigot*, viz. that here there are other parties interested, namely, the creditors of *James Cuffe Blake*, and that I cannot give interest against them, however I might act if the question were between the original parties or their representatives; but the answer to this is, that the deed, under which they derive their interest, contains an express trust to indemnify the

(a) See *D'Alton v. Lord Trimleston*, ante, vol. ii. p. 531.

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*Judgment.*

father and his annuity of 100*l.* a year against all prior incumbrances, and I do not know how that indemnity can be executed, except by payment of the annuity, in the same manner as if the prior incumbrances had not existed. The damage, which he has sustained, was the not receiving the annuity during the course of so many years. If he had received the annuity regularly, it would have been money which might have been put out to interest, and the only mode of placing the annuitant in the same position as if the annuity had been paid, is by giving him interest on the arrears.

There was besides, a covenant by *James Cuffe Blake* to pay the annuity, and also indemnify his father, and the annuity against all losses or damages, which might be occasioned by the prior incumbrancers. That a mere covenant to pay an annuity will not enable the Court to give interest is quite settled; but a covenant to indemnify a man against the effect of incumbrances, is a covenant of a very different nature, and if the perception of the annuity was prevented by the claims of incumbrancers, and especially if this happened in consequence of the acts of the covenantor, then a case for damages under the covenant has been clearly made out. No doubt if an action were brought upon that covenant, the covenantor would be entitled to recover interest upon the arrears as damages; the losses were incurred in consequence of the existence of the prior incumbrances, and after the allowing of Mr. *Martyn*, as mortgagee, to go into possession upon the discharge of the receiver, no one can dispute, that a loss did accrue to the annuitant from this cause.

Now as to the jurisdiction of this Court, this case falls

within the principle laid down by Lord *Hardwicke*, and which, since his time, has been always followed, that although there may be a covenant sounding in damages, over which, in its inception, the Court may not have original jurisdiction, and to enforce which, you must go to a Court of law; yet if the jurisdiction of this Court attaches in some other respect, and that the covenant comes in collaterally, this Court acquires jurisdiction, and will dispose of the whole matter before it, in order to prevent a circuitry of action, which it abhors. If I were to send this case to trial in a Court of law, for damages, I know what the measure of damages would be, namely, the amount of the arrears of the annuity and interest on those arrears, and on the cause coming back, I should have to give the party that relief; I, therefore, feel called upon to give interest on the annuity, according to the rules of this Court, for the purpose of preventing circuitry of action.

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Judgment.

This case is distinguishable from that of *Booth v. Leicester*(a); the covenant there was only for payment of the annuity, and although no doubt in the clauses of distress and entry, and in declaring the trusts of the term, whereby the annuity was secured, such expressions were used as "costs, charges, damages, and expenses, incurred, &c., by reason of, or on account of the nonpayment of the annuity;" yet the Court there held, that these words only amounted to an indemnity against the costs incident to the entry and possession, and against any loss from enforcing the security. But here there is a covenant to indemnify the annuitant against prior incumbrances. *Booth v. Leicester* was, I think, well decided; but it appears to

(a) 1 Keen, 247; 3 Mylne & C. 459.



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me to be distinguishable from this case, which seems within the principle of *Gay v. Cox*(a), although it is different in its circumstances. In the present case I am not overruling any case, or going beyond the rule laid down by my predecessors, when I decree the payment of interest on the annuity.

The only remaining question is, from what period this interest be paid? I think the time, when the rent was obtained, in 1817, should be the period, for the annuity could have been kept down then, had not Mr. *M* dealt with the possession in the manner he did, and allowed *James Cuffe Blake* to re-enter into possession. I, therefore, propose, to overrule the Master's report, and to allow the exception, and declare the party entitled to interest on arrears of the annuity from that period.

If upon looking into the authorities, I see reason to dissent from my opinion, I will mention the case again. If I do not mention it, the exception may be considered as allowed, and the interest can be calculated and added to the annuity without any necessity for a further reference to the Master.

The LORD CHANCELLOR did not mention the case again.

(a) 1 Ridg. P. C. 153.

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MURRAY v. JOHNSTON.

Nov. 29.

MURRAY JOHNSTON, the testatrix in this case, being  
 sed of a house in Eccles-street, Dublin, and also of  
 uses in Abbey-street, and being possessed of some paint-  
 ings and other articles of vertue, which were preserved in  
 her house in Eccles-street, made her will, dated the 21st of  
 June, 1834, and thereby gave the said Eccles-street house,  
 and all articles therein, at the time of her decease, to trust-  
 ees upon trust, for her nephew *Francis S. Johnston*, and  
 assigns for his life, remainder to his first and other sons  
 in tail male; remainder to her nephew *William Johnston* for  
 life, remainder to his first and other sons in tail male; with  
 similar remainders to her nephews, *George, Richard, An-  
 drew*, and *Henry Benjamin Johnston*, and their respective  
 issue; with an ultimate remainder to *Francis S. Johnston*, in  
 fee. And the testatrix directed her trustees, to the  
 utmost of their power, to preserve her paintings, &c., so that  
 the same might descend, "in the nature of heir-looms, to  
 the said respective tenants for life," who should, from time to  
 time, occupy the Eccles-street house. And the testatrix by  
 her said will further devised two houses situated in Abbey-  
 street, to her said nephew *Richard Johnston*, for life; with  
 remainder to his first and other sons in tail male; remainder  
 to the said *Francis S. Johnston*, for life, remainder to his first  
 and other sons in tail male; remainder to the said *William  
 Johnston*, for life, with similar remainders over to *Andrew,  
 Robert*, and *Henry Benjamin Johnston*, and their issue  
 male; with an ultimate remainder to *Francis S. Johnston*, in

A testatrix by  
 her will, de-  
 vised Black-  
 acre, to her  
 nephew *F.* for  
 life with re-  
 mainder to his  
 first and other  
 sons in tail  
 male, remain-  
 der to *R.* and  
 several other  
 nephews suc-  
 cessively for  
 like estates;  
 and she de-  
 vised Whiteacre  
 to *R.* for life,  
 remainder to  
 his first and  
 other sons in  
 tail male, with  
 remainders  
 over to *F.* and  
 several other  
 nephews in the  
 same manner.  
 Afterwards she  
 made a codicil,  
 and reciting  
 the gifts to *F.*  
 and *R.* and  
 declaring her  
 wish to give  
 to *R.* the pro-  
 perty there  
 devised to *F.*  
 and *vice versa*,  
 she revoked  
 the said gifts,  
 and devised the  
 provision by  
 her will given  
 to *F.*, to *R.*, his  
 heirs, execu-  
 tors, adminis-  
 trators, and as-  
 signs, and in  
 lieu thereof,  
 devised to *F.*  
 his heirs exe-  
 cutors, admin-  
 istrators, and  
 assigns, the

Property she had by her will given to *R.*—*Held*, that the limitations over in the will to the  
 nephews of the testatrix were revoked, and that *R.* and *F.* respectively took absolute in-  
 terests in their gifts.

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 —  
 Statement.

On the 20th of June, 1841, the testatrix executed a codicil to her said will, “ declaring that in all cases where legacies or other provisions have been made by my will, for any of the same persons (with the exception hereinafter made with respect to my nephews, *Francis* and *Richard Johnston*), the legacies hereby bequeathed are to be over and above, and in addition to, the legacies and other provisions devised by my said will.” After bequeathing the pecuniary legacies, the testatrix proceeded thus:—“ I devise as much as by my said will, I devised my house and concerns in Eccles-street, with certain other bequests, to my nephew *Francis Johnston*, and it is now my wish to bequeath the said house and concerns, and all other the property by my said will devised to the said *Francis Johnston*, to my nephew the Rev. *Richard Johnston*, and to give all the property by my said will devised, to the said *Richard Johnston*, to the said *Francis Johnston*, I do hereby revoke the said bequest by my said will made to the said *Francis* and *Richard Johnston* respectively, and do leave and bequeath the said house and premises with the appurtenances, and all the furniture and pictures, ornaments and moveables therein (save the jewellery and wearing apparel) and also all other the property and provision by my said will devised to the said *Francis Johnston*, to the Rev. *Richard Johnston*, his heirs, executors, administrators, and assigns; and in lieu of the said bequest in favour of the said *Richard Johnston*, as to all the property of what nature or kind by my said will devised to the said *Richard Johnston*, I devise and bequeath the same to the said *Francis Johnston*, his heirs, executors, administrators, and assigns.” And the testatrix bequeathed her jewellery and wearing apparel to a Mrs. Murray. The testatrix had not mentioned her jewellery in her will.

A bill having been filed to carry into execution the tr

of this will and codicil, and the usual reference to the Master having been made, he, by his report, found, that *Richard* and *Francis Johnston*, respectively, took absolute interests in the Eccles-street and Abbey-street premises.

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Statement.

To this report, exceptions were taken by *William Johnston*, that the Master should have reported, that under the said will and codicil, *Richard* and *Francis Johnston* took only estates for life, in the properties devised and bequeathed to them respectively, with remainders to their first and other sons in tail male, with remainders over, to the several other nephews of the testatrix, and their sons, in the order and for the estates expressed in the said will.

Mr. Serjeant *Keatinge*, and Mr. *Henderson* for the Plaintiff.

Argument.

The Attorney-General, and Mr. *Brereton* for the Defendant *William Johnston*, in support of the exceptions.

The question is, whether there is an absolute revocation and new disposition of gifts, or merely a substitution of persons. There is no express revocation of the gift to *William Johnston*; his name is not mentioned in the codicil, much less is there any declaration that he had ceased to be an object of the bounty of the testatrix. The true construction is merely to substitute *Richard* for *Francis*, and *vice versa*, without disturbing the limitations over. "Heirs" in the codicil, may be construed to mean the special heirs of the will, viz. "issue," *Goodtitle v. Woodhall*(a), *Sherratt v. Bentley*(b). The case of *Philipps v. Allen*(c) will probably be relied upon at the

(a) Willes, 592.

(c) 7 Sim. 446.

(b) 2 Mylne & K. 149.

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 Argument.

other side ; but it differs from the present in several important features. In that case the first codicil recited the devise for life and the subsequent limitations, and then the testator devised his said real estate, &c. to *James D. Lloyd*, and his heirs, under the same conditions and limitations, as he had by his will devised the said estate to *John Lloyd* ; but here the testatrix confines the new devise to the “ property and provision ” given by her to *Francis Johnson* and *R. Johnson*, not referring to the limitations. Again, in another codicil, the testator, after reciting the first devise, revoked the said Penty Park estate, and devised said estate to *James P. Lloyd*, on condition, that he took the name and arms of *Philipps*. Three of the Judges of the Court of law, to which the case was sent, certified their opinion against any revocation of the limitations over, and Mr. Justice *Parke*, who dissented from his brethren, appears to have relied much on the word “ estate.” The clause directing a name and arms to be assumed, which does not occur here, was there much relied on, in favour of the supposed intention to give a fee ; and so also, in *Robinson v. Robinson*(a). If the codicil here is to be construed with strictness, the construction will be, to give each devisee of the property given in the codicil an estate therein for the life of the devisee, to whom the same property had been given by the will. *Willet v. Sandford*(b), *Doe v. Hicks*(c), *Thornhill v. Hall*,(d) *Lord Carrington v. Payne*(e), *Boon v. Coirforth*(f), *Coryton v. Helyar*(g), were also referred to.

Mr. Serjeant *Warren*, and Mr. *Keatinge* for the report, were stopped by the Court.

(a) 1 Burr. 38 ; 2 Ves. Sen. 225. (e) 5 Ves. 404.

(b) 1 Ves. 186.

(f) 2 Ves. Sen. 276.

(c) 8 Bing. 475.

(g) 2 Cox, 340.

(d) 2 Clarke & F. 22.

THE LORD CHANCELLOR:—

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JOHNSTON.  
Judgment.

I cannot persuade myself, that in this case there is really any room for doubt. The testatrix, having two distinct properties, by her will set about disposing of them in strict settlement. The premises in Eccles-street, she gave to one nephew for life, with remainder to his first and other sons; and then to the next nephew, and so on, through all her relations; and she gave most anxious directions about certain paintings and articles of taste, which she desired should go, according to her expression, as heir-looms, with the Eccles-street property; nothing could be more distinct than the language of the bequest. Then followed the disposition of the Abbey-street houses, which she gave in the first instance to the one of the nephews, to whom she had given the first remainder in the former property, with similar remainders over, but including the nephew, the first taker of the Eccles-street property. Having made these arrangements, the testatrix, some time afterwards, executed a codicil, and referring to the two devises of the houses in Eccles-street and Abbey-street to the nephews, to whom she had given them for life, she certainly does not go on to mention the subsequent remainders which she had limited, but it is manifest she took the first limitation of each property, as representing the whole line of limitations. Taking then each first devisee, as the head representing the entire series, she says, I mean to change this disposition, and as to the property by my will bequeathed to my nephew *Francis*, I now give it to my nephew *Richard*, his heirs, executors, administrators, and assigns; and in like manner, I give to my nephew *Francis*, his heirs, executors, administrators, and assigns, the property I had bequeathed to *Richard*. It was argued that the testatrix had not revoked all the gifts of these houses; I agree she did not do so in express terms,

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 ———  
*Judgment.*

but she considered one gift as representing all, and said in effect, generally, I revoke those benefits which I had conferred by my will, and make a new disposition in lieu thereof. Suppose, that instead of using any words of revocation, she had simply made the new disposition as said, "I now give the property, which I before gave to the devisee of the Abbey-street houses, to the devisee of the Eccles-street houses, his heirs, executors, &c. (using the latter words, because the bequest consisted partly of real and partly of personal estate), must I not have held that the latter took the whole estate in the subject of the gift? I am not at liberty to submit to mere conjecture in the interpretation of wills, it is my duty to give to expressions the effect, which the law attributes to them, unless some different meaning of the testator can be pointed out.

I have been referred to cases in which the word "heir" was held to mean "issue;" but in all those cases, there were words in the will to show that the word "heirs" was used in that sense, and by which it could be so interpreted; but where on the face of this codicil can you show me anything to justify the interpretation, which is sought to be put upon these devises? Independently of the intention of a testator, I must give to his words the import, which the law attaches to them. Now the law says, that a gift to a man and his heirs, is a gift in fee simple. How can I, in opposition to this rule of law, say, that in this case, these words mean a life-estate only? And this too, when from the whole frame of the will, I see that the testatrix knew perfectly well how to guard her dispositions and express her meaning. Nor is there anything untechnical in the codicil; she might, it is true, have added to her sentence, "and al

remainders expectant thereon," but the omission of these words does not raise the slightest doubt in my mind, as to her intention. She had altered the entire scheme of her bounty, and she has expressed what she intended. Looking at the nature of her property, she probably saw the folly of tying it up, as she had done by her will, in a strict settlement. In her will, she had made no express mention of her jewels, but she no doubt considered them as included in the general disposition of the articles in the houses. In the codicil there is an exception of the jewels, which shows an intention to change the disposition of her will in that respect also, for she disposes of those jewels absolutely to another person.

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Judgment,

As to the case cited, *Philipps v. Allen*(a), I think it was rightly decided upon the effect of the word "estate;" but it was a much more difficult case than the present, for here are words of inheritance, which in that case were wanting. There they had to arrive at the conclusion by construction. As to the argument, that a literal construction of these instruments would only give estates *pur auter vie*, I am not obliged to adopt an absurd and inconsistent construction, when one that is plain, reasonable, and consistent is open to me. The case has been very well argued, but it is perfectly free from doubt, and the exceptions must be overruled, but without costs, as the bill has been filed to obtain the opinion of the Court on the will and codicil for the direction of the trustees.

(a) 7 Sim. 446.



1842.

BURROUGHS v. M'ILVEEN.

Nov. 25.

Where a Plaintiff, after having excepted to the answer of a Defendant, amended his bill, and then obtained an order at the Rolls for liberty to argue the exceptions, notwithstanding the amendments; the Court, on appeal, ordered the Plaintiff to pay the costs of the motion at the Rolls, and of the exceptions, and the Defendant to answer the amended bill, and so much of the original bill as remained unanswered, within six weeks.

THE bill in this cause was filed for a partition; on the 9th of August, *Jane Roberts*, one of the Defendants, answered on the 6th of October exceptions were taken by the Plaintiff to the answers of several of the Defendants, and among others, to that of the Defendant *Jane Roberts*. On the 13th of October the Plaintiff amended his bill. The order to amend was in this form. It recited, that exceptions had been taken to the answers of *Anne M'Creight*, *John M'Creight*, &c. &c., and without referring to the exceptions to the answer of *Jane Roberts*, it ordered, that the said Defendants should answer the amendments and the said exceptions.

The Plaintiff having amended, issued a summons to have the exceptions to the answer of *Jane Roberts* argued; it was insisted on her part, that they had been waived by the Plaintiff's amendments. The Master was of this opinion but extended the time in order to give the Plaintiff liberty to apply to the Court for leave to argue the exceptions.

The Plaintiff accordingly having applied to the Court on the 3rd of November, an order was pronounced at the Rolls by his Honor, "that the Plaintiff should be at liberty to argue the exceptions taken to the answer of the Defendant *Jane Roberts*, widow, notwithstanding her having amended the bill in this cause under the order of the 13th of October, 1842."

The Defendant *Jane Roberts* now moved to discharge his Honor's order.

Mr. Serjeant Warren and Mr. R. Andrews for Jane Roberts.

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v.  
M'ILVEEN.  
Argument.

The Plaintiff in this case is clearly irregular. It is quite settled, that when a Plaintiff amends his bill, such amendment is a waiver of the exceptions, *Taylor v. Wrench*(a): Lord Eldon there said, "that the mere addition of a Defendant, no new matter, requiring no farther answer, was an excepted case." Here the amendments are material, and refer distinctly to the Defendant *Roberts*: for the order of the 13th of October requires, "the said Defendants" to answer the amendments and the exceptions. If the Plaintiff wished to retain his exceptions, he should have made a special application for liberty to amend without prejudice to the exceptions, *Jacob v. Hall*(b), *De La Torre v. Bernales*(c); and even so, unless the amendments were merely formal, the application would not have been granted. In *De La Torre v. Bernales*, the amendments only went to the prayer of process, and therefore required no further answer. But independently of this, there is the general rule of the 13th of June, 1730(d), which provides, that where a party moves to amend his bill, and by the amendment requires a further answer, any exceptions which may have been taken to the original bill are thereby waived. This rule is still in force, and ought not to be altered in a pending suit, *Leyburn v. Green*(e).

(a) 9 Ves. 315.

(b) 12 Ves. 458.

(c) 4 Madd. 396.

(d) Gen. Order, 13th of June, 1730.—"Lord Chancellor declares it for a general rule, that where a party moves to amend his bill, and by which amendment a further answer is required, if any exceptions be taken to the answer to the

original bill, the moving to amend the bill waives the exceptions, and the party must pay the costs of the exceptions; and the party is not only to answer the amendments, but all such parts of the bill as were not before answered."—Smith's Rules, p. 79.

(e) 2 Russ. 577.

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Argument.

Mr. S. B. Miller in support of the order.

The general practice is, it is true, such as it is stated to be at the other side: but is this Court so fettered, as to be at liberty to vary from even a settled practice, if the justice of the case requires it? In *O'Grady v. Barry*(a), Sir Michael O'Loughlen held, that the Court could dispense with the strict observance of even its General Orders. In this case his Honor exercised a discretion in granting the order in question, and the present application is in point of fact an appeal from an alleged undue exercise of that discretion. This case is not within the rule of the 13th of June, 1730, for the Defendant, *Jane Roberts*, was not required to answer the amendments. The cases of *Taylor v. Wrench* and *Jacob v. Hall* do not apply, for there the exceptions were after the amendments. *De La Torre v. Bernales* was an injunction case, where the Plaintiff is bound to put his case upon the record in the first instance, *Leyburn v. Green*(b); and it is in such cases, and in such only, that the rule is strictly adhered to, *Dixon v. Redmond*(c).

Judgment.

THE LORD CHANCELLOR :—

It is quite true, as a general rule, that the Plaintiff, in amending his bill, waives his exceptions to the answer; but any difficulty which might exist is provided for by the order of June, 1730; for under that order the Defendant is bound "to answer not only the amendments, but all such parts of the bill as were not before answered." How then can the Plaintiff be damnified? He seeks to be at liberty

(a) 1 Ir. Eq. Rep. 11.

(c) 2 Sch. & L. 515.

(b) 2 Russ. 577.

to argue the exceptions. But if the exceptions be good, under the general order the Defendant would be obliged to answer such parts of the bill as she had left unanswered. It is said, that this Defendant, *Jane Roberts*, was not required to answer the amendments; and no doubt there is some ambiguity in the order of the 13th of October, whether the words "said Defendants" apply generally to all the Defendants, or to those only who are previously mentioned in the body of the order. If the order did not apply to her, then the exceptions are untouched; but if it did, then the exceptions are waived; but still under the general order she would be compelled to answer the matter of the exceptions. However, I think the only question at present is, what course is now to be adopted, in order to put all parties right. Let the Plaintiff pay the costs of the exceptions, and the costs of the motion at the Rolls, so far as it relates to this Defendant, and let her answer within six weeks the amended bill, and so much of the original bill as remains unanswered; and let there be no costs upon this motion.

1842.  
BURROUGHS  
v.  
M'ILVEEN.  
Judgment.

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Let the Plaintiff pay to the Defendant, *Jane Roberts*, so much of the costs of the application at the Rolls as relates to the said Defendant, and also the costs of the exceptions; and let the said Defendant, *Jane Roberts*, pursuant to the general order bearing date the 13th of June, 1730, answer the amended bill, and so much of the original bill as remains unanswered, within six weeks from the date of this order. No costs upon this motion to either party. The deposit to be returned to the said Defendant's solicitor.

Order.

*Reg. Lib.*, 1842, fol. 157.

1842.

## DRINAN v. MANNIX.

Nov. 25.

Bill by a *feme covert* and her infant children, the same person being the next friend of the married woman and the minors. The bill was filed in the vacation; and within the time prescribed by the general rules, the Defendant filed a demurrer, and served a notice on the same day, apprizing the Plaintiffs, that the demurrer was filed without prejudice to the right of the Defendant to move to compel the Plaintiffs to give security for costs:—  
*Held*, that by the filing of the demurrer, the right to compel the Plaintiffs to give security for costs was not lost.

*Held* also, notwithstanding that the same person is next friend to the infants and the *feme covert*, that the Court will compel the Plaintiffs to give security for costs.

The form of the order in such a case, is that the proceedings be stayed, until the next friend of the *feme covert* be changed, or security for costs be given.

THIS was an appeal from an order of the Master of the Rolls.

The bill in this case was filed on the 3rd of August, 1842, by Mrs. *Elizabeth Drinan*, the wife of *John Andrew Drinan*, and her infant children, *Charles, Elizabeth, Mary Anne*, and *Teresa Drinan*, against *Charlotte Mannix, John Andrew Mannix*, and several others.

*George Drinan*, by whom Mrs. *Elizabeth Drinan* sued as her next friend, was also the next friend of the minor co-Plaintiffs.

On the 19th of August the Defendant *Charlotte Mannix* appeared, and on the 3rd of September she demurred to the Plaintiffs' bill; and at the same time served a notice on the Plaintiffs, that the demurrer was filed without prejudice to her right to move to compel the next friend of the *feme covert*, Mrs. *Drinan*, and the minor co-Plaintiffs to give security for costs; and that she would apply to the Court for an order to that effect.

On the 12th of November a motion was accordingly made at the Rolls, that the Plaintiffs' proceedings in the cause should be stayed, until the next friend of the Plaintiff, *Elizabeth Drinan*, be changed, or security be given for costs.

The motion was grounded upon an affidavit, stating the insolvency of the *prochein ami*, *George Drinan*; and this fact not having been denied by the Plaintiffs, his Honor was pleased to order, that the further proceedings in the cause should be stayed, until the next friend of the Plaintiff, *Elizabeth Drinan*, should give security for costs(a). From this order the Plaintiffs appealed.

1842.  
DRINAN  
v.  
MANNIX.  
Statement.

Mr. Pigot and Mr. Haig for the Appellants.

Argument.

It is quite settled, that the poverty of the next friend of an infant Plaintiff is no ground for compelling such next friend to give security for costs; *Squirrel v. Squirrel*(b), *Davenport v. Davenport*(c), *Fellows v. Barrett*(d), *Murrell v. Clapham*(e). The peculiarity of the present case is, that the *prochein ami* of the infant co-Plaintiffs is also the *prochein ami* of the married woman, who is the mother of the minors: if the order of the Court below is supported, it will inflict an injury on the minors, for it amounts to this, that the circumstance of the mother being joined as a co-Plaintiff, has imposed an obligation upon the mutual next friend of both parties, which otherwise clearly did not exist. The suit is one instituted for the benefit of the infants, and the fact of their mother, their natural guardian, being joined with them, ought to satisfy the Court of the propriety of the proceedings. Why then should the Court fasten on this very circumstance to work them an injury, and to confer a benefit on the other side. If the suit has not been instituted for the benefit of the infants, the Court will interfere by ordering the bill to be taken off the file,

(a) See the report of the case at the Rolls, in 5 Ir. Eq. Rep. 162.

(c) 1 Sim. & S. 101.

(b) 2 Dick. 765; see 2 P. Wms. 297 (n).

(d) 1 Keen, 119.

(e) 8 Sim. 74.

1842.

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v.

MANNIX.

Argument.

*Walker v. Else(a)*; or by directing an inquiry whether the suit is for the benefit of the infants, and if so, whether the next friend is a proper person to conduct it, *Nalder v. Hawkins(b)*, *Robinson v. Stone(c)*; but it never interferes where there are minor Plaintiffs, by staying the proceedings until security for costs is given. His Honor's decision was founded on *Pennington v. Alvin(d)*; but that is a solitary case, and altogether dissimilar from the present; for there the suit was substantially the suit of the *feme covert*; and in addition to this circumstance, Sir *John Leach* seems to have been influenced by the nature of the suit, which he characterizes as being "a gross case." In the present case it is not attempted to bring any charge against the moral character of the next friend; it is not even alleged that the suit is an improper one. In addition to these objections to the order, it is settled, that where there is a Plaintiff upon the record, as against whom the Defendant is not entitled to an order to give security for costs, for instance, where there are two co-Plaintiffs, one of whom is within the jurisdiction, and the other is resident abroad, that the right is gone, *Walker v. Easterby(e)*; and the same rule prevails at law, *M'Connell v. Johnston(f)*, *Anonymous(g)*, *Doe d. Bawden v. Roe(h)*. Here there is a Plaintiff against them, the Defendants are not entitled to security for costs, and therefore, according to this principle, the order cannot be supported.

But there is a still further objection, which the Plaintiffs are entitled to rely upon. It is quite established that the

(a) 7 Sim. 234.

(b) 2 Mylne &amp; K. 243.

(c) C. P. Coop. 369.

(d) 1 Sim. &amp; S. 264.

(e) 6 Ves. 612.

(f) 1 East, 430.

(g) 2 Tyrw. 167.

(h) 1 Hodges, 315.

right to move for security for costs is lost by the party taking a step, *Groves v. Blake*(a), *Robinson v. Bradley*(b), *Onge v. Turnlock*(c), *Watson v. Pim*(d), *Eyre v. Dwyer*(e). In this case the Defendants filed their demurrer on the 3rd of September; giving notice no doubt at the same time, that the demurrer was filed without prejudice to the right to make the present application. Nevertheless it was a step, and one, which compelled the Plaintiffs to take another step, for they were obliged by the terms of the general rule to set down the demurrer for argument; according, therefore, to all the authorities, the application, which is one of strict right, was too late, and the order consequently must be reversed. In point of form too the order is incorrect, as it ought to have given the Plaintiffs the option of giving security for costs, or having the next friend changed, and a new one substituted in his place, *Witts v. Campbell*(f), *Davenport v. Davenport*(g).

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v.  
MANNIX.  
Argument.

Mr. Serjeant *Warren* and Mr. *Orpen* in support of the order.

The point of waiver, which is here insisted upon, cannot be sustained. The Defendant was obliged to take the step, which is now relied upon, by reason of the Plaintiff's own act, in filing this bill in the vacation, when the Court was not sitting. By the general rule of the Court, the Defendant had only a limited time, within which she could demur. It was not possible at any time after the filing of the bill, and before the demurrer, to make any application to the Court; but she did every thing that lay in her power,

(a) 1 Hog. 359.

(b) 4 Law Rec. N. S. 9.

(c) Beatty, 341.

(d) Sausse & S. 642.

(e) Sausse & S. 653.

(f) 12 Ves. 493.

(g) 1 Sim. & S. 101.



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Argument.

namely, by accompanying the demurrer with a notice to the effect, that it was not to be held to prejudice her right to compel the Plaintiffs to give security for costs. Formerly such an order could have been obtained at any time ; but this was altered by Lord *Thurlow*, *Anonymous(a)* ; and in a later case, *Weeks v. Cole(b)*, Lord *Eldon* stated, that the Defendant should apply “as soon as there is any occasion.” The cases of *Elliott v. Grattan* referred to in *Groves v. Blake(c)*, *Robinson v. Bradley(d)*, and *Stackpoole v. O’Callaghan(e)*, are authorities to show that the Defendant is in time. Assuming then that Defendant has not waived her right to compel the Plaintiffs to give the required security, *Pennington v. Alvin* is a direct authority on the general question now before the Court ; and that case establishes this that the liability of the next friend of a *feme covert* to give security for costs cannot be avoided by joining infants as co-Plaintiffs with the married woman, and adopting the same next friend. It is said at the other side, that if there are co-Plaintiffs, against whom the Defendant is not entitled to carry an order for security for costs, the right generally is gone, and *Walker v. Easterby(f)*, and some cases at law in support of this principle, were cited. But in *Walker v. Easterby*, the co-Plaintiff, who was responsible for costs, was solvent ; and the rule cannot be pushed so far as this, that even if the co-Plaintiff, against whom the right does not exist, is a pauper, nevertheless the Defendants are not entitled to have the security. In *Winthorp v. Royal Exchange Assurance Company(g)*, Lord *Hardwicke*, in refusing an order of this nature, explains the reason

(a) 10 Ves. 287.

(b) 14 Ves. 518.

(c) 1 Hog. 359, 360.

(d) 4 Law Rec. N. S. 11.

(e) 1 Ball &amp; B. 566.

(f) 6 Ves. 612.

(g) 1 Dick. 282.

the rule referred to, because he says, "there was one of the Plaintiffs living in England, who would be always liable to the costs, and there was no evidence before him of the inability of such Plaintiff to answer them."

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DEINAN  
v.  
MANNIX.  
Argument.

THE LORD CHANCELLOR:—

Judgment.

The judgment of his Honor turns altogether upon the question, whether such a step had been taken, as prevented the party from applying for security for costs. I entirely agree with the Master of the Rolls on this point. It is said, that the motion ought to have been made before the demurrer was put in. No doubt the general rule is so; but the situation, in which the parties were, furnishes, I think, a sufficient excuse for not complying with that rule. The bill was filed in vacation; the Defendant could not then apply to the Court, that the Plaintiffs should give security for costs; but he complied with the rule as far as he could, viz., by giving notice at the time, when the demurrer was filed, that he would apply to the Court that the Plaintiffs should be compelled to give security for costs. I cannot see how he could have acted more properly, for the rule of the Court compelled him to take a step: it was, therefore, not his fault. Why did the Plaintiffs wait until the vacation had commenced to file their bill? I think that the case is not bound by any authority, and that the right to make the present application has not been lost.

A question then of a different nature arises, and one of considerable importance. The same person is the next friend of the *feme covert* and also of the infant Plaintiffs; and the only ground, which has been stated for the present order, is the want of ability in the next friend to pay the

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v.  
MANNIX.

—  
Judgment.

costs, if any should be awarded against him. This has been established. It is sworn to on one side, and not denied by the other. Now it is perfectly settled, that as regards the next friend of an infant Plaintiff, that objection cannot be maintained. Therefore, as far as the party is the next friend of the infants, the Defendant has no right to call for a security for costs. But then it is said, that in his character of next friend to the *feme covert*, the Defendant has clearly such a right; and that the rule has been so laid down in *Pennington v. Alvin*(a), by Sir John Leach, who understood the rules and practice of the Court, as well as any judge who ever presided in a Court of Equity. The difficulty arises from all the Plaintiffs having the same person as next friend. As next friend for the infants he cannot be required to give security for costs. Can he then as next friend for the *feme covert* be called upon for such security? If a Plaintiff be out of the jurisdiction, he must give security for costs, although he may be perfectly solvent, because there is no remedy against the person. But if the Plaintiff be within the jurisdiction, although utterly insolvent, the Court will not require him to give security, because then there is a remedy against the person. But the rule in the case of a *feme covert*, suing by her next friend, who has himself no interest in the suit, is, that security must be given. If the wife had had a different next friend, there would have been no doubt. As I understood the argument as first opened, the Plaintiffs were rather endeavouring to obtain a variation of the order than to discharge it altogether. It was urged, that the cause should be stopped as against one of the co-Plaintiffs, and not against the other. But that would be impossible. The proceedings cannot be stayed as against the *feme covert*, and the infants

(a) 1 Sim. & S. 264.

allowed to proceed. The order, therefore, is either right or altogether wrong. The question then arises, will the Court compel the Plaintiffs to give security for costs in a case, where the same person is next friend to both infants and *feme covert*? My opinion is, that the Court will do so. I must treat the case, as if there were two separate next friends. *Pennington v. Alvin* is an authority to that effect. The Vice-Chancellor in that case said, "I should hesitate much before I called upon the next friend of an infant to give security for costs; for any person may file a bill in the name of an infant. But the suit of a *feme covert* is substantially her own suit, and her next friend is selected by her." He held that security was to be given for costs, upon the mere ground of its being the suit of the *feme covert*. If that be so, the case is a clear authority in support of the order of his Honor in this case. The order should be varied by inserting the words which the Plaintiffs now require: but I am clearly of opinion, that the Master of the Rolls would have so varied it, had he been asked. The words, therefore, must be inserted, and let there be no costs on either side. The decision of the Rolls was quite right, but the point was not free from difficulty.

1842.  
DRINAN  
v.  
MANNIX.  
Judgment.

The order drawn up was as follows:

Refuse the motion and affirm the Rolls' order: and let proceedings in this cause be stayed until the next friend of the Plaintiff, *Elizabeth Drinan* the elder in this suit, be changed, or she shall give security for costs. Refer it to the Master in this cause, to measure the amount and approve of such security. No costs on this motion. The deposit to be returned to the Plaintiff's solicitor.

Order.

*Reg. Lib.* 1842, fol. 156.

1842.

The ATTORNEY-GENERAL v. DRUMMOND

Nov. 26.

The trustees in this case were allowed their costs out of the fund.

The Court refused to direct the costs of the relators to be taxed as between solicitor and client.

Form of the decree in such a case.

THE facts of this case have been already fully reported in a former volume<sup>(a)</sup>. The case was reserved for judgment until the result of the decision of the House of Lords in *Lady Hewley's Case* was known. The House of Lords having by their decree in that case, in the month of August last, confirmed the decisions of the Courts below, the present case came on now to be finally disposed of.

Mr. Serjeant *Warren*, Mr. *William Brooke*, and Mr. *Ward Wright* on the part of the relators, applied for the direction of the Court as to the removal of the trustees, the period from which the account was to be directed. With regard to the costs of the suit, even though trustees innocent, yet if they have made a mistake, which has occasioned the suit, they are not entitled to costs. In *Lady Hewley's Case* the trustees were not allowed their costs.

The *Solicitor-General* and Mr. *Holmes* for the Unitarian Trustees contended, that they were entitled to costs. The question on the construction of the deed was one of considerable difficulty. The trustees had applied the fund for a long period of time, more than a century, and without objection, in a manner, which the Court had now, it is true, decided to be wrong; but there was no allegation that they had not been acting with perfect good faith: at least therefore, it was an error of judgment on their part; and one in which the present trustees, as well as all those who preceded them, equally shared.

(a) Vol. i. p. 353.

Mr. Gibson, Mr. Greer, Mr. Butt, and Mr. T. R. Henn, appeared for the other Defendants.

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THE ATTORNEY-GENERAL  
v.  
DRUMMOND.  
Judgment.

THE LORD CHANCELLOR :—

It seems to be admitted, that one set of the trustees, those who are Trinitarians, are to have their costs. But it is contended, that the Unitarian trustees are not entitled to costs. However, it appears to me, that it would be somewhat difficult to draw any distinction between them. How can I separate them? Am I now to inquire in what manner every particular trustee voted? They all joined in the distribution of the fund in a manner, which the Court has pronounced to be a breach of trust. However, I do not think that I ought to refuse the trustees their costs in the present case. There is no pretence for saying, that they were influenced by any improper motives; nor has there been any attempt, either at the former hearing, or upon the present occasion, to cast any imputation upon them. The endowment was a very early one, and an opinion prevailed, that the trust was general, and included all dissenting bodies, both Trinitarian and Unitarian. The sole question in the case was, whether persons professing Unitarian doctrines were entitled to participate in the trusts of the deed of May, 1710. I have already declared my opinion to be, that Unitarians were not within the benefit of the trust, and that a breach of trust has consequently been committed. No doubt the general rule is as it has been stated to be, that a trustee, who acts wrongly, and against whom there has been a decision, is not entitled to costs. But it can hardly be said,

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 THE ATTOR-  
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 v.  
 DRUMMOND.  
 Judgment.

that the rule applies to a case of this nature, where ~~more~~ <sup>if</sup> more than a century, the funds have been applied in a manner, in which the parties are now found fault with for having so applied them. I should treat the present trustees with great hardship, if I were now to decide that they were not entitled to their costs, when all their predecessors have escaped. The case is different from that of private trustees, where each must suffer for the consequences of his own mistake. Here there has been a succession of trustees and were I to refuse the present trustees their costs, it would be in fact to visit upon them individually the error of their predecessors. Again, although I always entertained a very decided opinion on the question, yet cannot venture to say, that there was no doubt in the case, or that there was no foundation for the view taken by the trustees. Besides, there has not been an exclusive misapplication of the fund: for in part the fund has been properly applied, and so far the trustees were right. My opinion therefore is, that under the circumstances of the case, and after such a lapse of time, the trustees ought to have their costs out of the fund. The present trustees are to be removed, and it must be referred to the Master to appoint new trustees in their room. I intend to follow the terms of the decree in *Lady Hewley's Case* precisely. The account must go from the filing of the information. With respect to any payments which have been made since that period to ministers or students, in fact, the ordinary expenditures incurred in the management of the trust fund, I do not mean that they shall be disturbed. The 100*l.* per annum, which has been hitherto paid to the ministers of the Strand-street Chapel, is not to be taken into the account, as I understand that an inf

mation has been filed respecting that fund. The decree must, therefore, contain a reservation as to that part of the trust fund.

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THE ATTOR-  
NEY-GENERAL  
v.  
DRUMMOND.

*Judgment.*

Mr. *Brooke*, on a subsequent day, applied that the costs of the relators should be taxed as between solicitor and client.

THE LORD CHANCELLOR refused the application, observing, that under the general order the taxation would go very much upon that principle; and that if a special direction were now given, the Master would think, that in order to carry out that direction, he was required to allow extravagant charges. His Lordship added, that though in this case he had allowed the trustees their costs, yet that it was not to be considered as a precedent in every case. The question upon the trust was now decided; and if in a like case, the trustees intended to come in and oppose a similar information, they should do so upon their own responsibility.

Declare that ministers, or preachers, of what is commonly called Unitarian belief or doctrines, and the students and congregations, and other persons holding, or professing to hold, what is commonly called Unitarian belief or doctrines, are not fit objects of, and are not entitled to participate in the trusts or funds created by the deed of the 1st of May, 1710, in the pleadings mentioned: Declare, that the Defendants, the Rev. *William Hamilton Drummond*, *Thomas Wilson*, *John Barton*, *John S. Armstrong*, *William Drennan*, the Rev. *Joseph Hutton*, the Rev. *James Crawford Ledlie*, *Nathaniel Hone*, *Brindley Hone*,

*Decree.*



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 THE ATTOR-  
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 v.  
 DRUMMOND.  
 Decree.

*Robert Moore Peile, William Bigger, James Ferrier, the Rev. Samuel Simpson, William Madden, and William Wilson Jameson, and also the Rev. George A. Armstrong,* who, as successor to the Rev. *James Armstrong*, became an ex officio trustee since filing the informations in this cause, be removed from being trustees or managers of the said charity. Refer it to *Edward Litton, Esq.*, one of the Masters to appoint proper persons to be trustees or managers thereof in the room of the several Defendants so removed. Declare that the Defendants severally do, or such of them as are competent so to do, convey, assign, and transfer the trust estate and funds belonging to the said charity vested in them, with the approbation of the said Master, to such new trustees so to be appointed, together with the five other trustees not hereby removed, namely, the Rev. *James Horner, the Rev. James Carlisle, William Johnson, George A. Proctor, and Joseph Henry*, to, and for, and upon the several trusts, and to such uses as are expressed and declared of and concerning the same in and by the said trust deed, and they are to declare the trusts there accordingly; and such conveyances and assignments are to be settled by the said Master.

Refer it to the said Master to take an account of the rents and profits of the said charity estates, and of the funds belonging thereto, received by the Defendants, any or either of them, or by their, or any or either of their order, or for their, or any or either of their use, since the 24th of March, 1840. Let the said Defendants, in the taking of the said accounts, have credit for the sum of 211 *l.* 11 *s.* 5 being the amount paid by them as exhibitions to student grants to congregations for their ministers, investitures, stock, and other ordinary expenditures incurred in the

management of the said trust fund, since said last mentioned day up to this period ; and let the balance, if any, in the hands of the said Defendants, be lodged in the Bank of Ireland, to the credit of this cause, with the privity of the Accountant-General of this Court. Let the said Defendants have also credit for the sum of 92*l.* 15*s.* 4*d.* per annum, paid by them to the ministers of Strand-street, Dublin, congregation. And it appearing to the Court, that an information is now pending in this Court at the suit of the said relators, respecting the meeting-house and premises in Strand-street in the pleadings mentioned ; and respecting the funds and properties of and belonging to the said Strand-street congregation, the Court is pleased to pronounce no decree as to that portion of the trust fund for the present, and to direct, that the same annual payment shall be continued as heretofore, until the determination of such pending suit. Refer it to the Master to tax all parties their costs. Let the sum of 3600*l.*, Old Three and a Half per Cent. Government Stock, standing in the names of the said *Nathaniel Hone* and *Thomas Wilson*, be transferred by them, the said *Nathaniel Hone* and *Thomas Wilson*, to the credit of this cause, with the privity of the Accountant-General, with liberty to the said relators, and also for the several other parties to apply as against such fund for the costs hereby directed to be paid, when taxed and ascertained. Refer it to the said Master to appoint a proper person to be receiver, and let the said Master be at liberty to make a separate report thereon. Let the said Defendants bring in and lodge in the said Master's Office, all books, deeds, papers, and documents in their possession or power relating to the said trust funds and premises comprised in the said deed of the 1st of May, 1710, in the pleadings mentioned, and which are set forth and verified in the schedule referred

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THE ATTOR-  
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Decree.

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 Decree.

to by the answer of the said Defendants, trustees,  
 hereby removed.

*Reg. Lib. 87, fol. 13,*

### HARVEY v. LAWLOR(a).

Nov. 25.

Creditors by judgment and recognizance, although scheduled to a trust deed, executed for their payment, are within the General Order of the 22nd June, 1842, when a suit is instituted in this court for carrying into execution the terms of such deed by sale.

THE bill in this cause was filed on the 23rd of Sep 1842, for the purpose of carrying into execution, in directions of the Court, the trusts of a certain deed 2nd of May, 1842, for the payment of the debts of various scheduled creditors of the Defendant, *Patrick*

It appeared by the pleadings, that *Patrick Lawlor* entitled to certain lands in the counties of Cork and ford, executed a mortgage of the same, bearing date of June, 1839, to *Norman Uniacke*, to secure an then made with interest; and afterwards executed mortgage of the same lands, bearing date the 28th cember, 1840, to *Robert Murray* and *Thomas* Managers of the Provincial Bank of Ireland, for pose of securing a further advance; that the *De Lawlor*, became much embarrassed in his circumstances and that various judgments and recognizances, to ber of twenty, were obtained against, and entered i him for securing other debts; that on the 2nd of May conceiving that the said lands would be sufficient payment of all his debts, he executed the deed 2nd of May, 1842, whereby he conveyed the said the Plaintiff upon trust to sell and apply the

(a) *Ex Relatione.*

thereof in payment of all his creditors by mortgage, judgment and recognizance, who were respectively mentioned in the schedule to the deed. In this deed was contained a proviso, that in case all the scheduled creditors would not come in under the deed, or that the produce of the sales of the lands would not extend to pay them all in full, or if any difficulty should arise in the execution of the trusts, it should be lawful for the Plaintiff to file a bill for the purpose of having the trusts performed under the sanction of the Court, and of applying the produce in a due course of priority. Some of the creditors having declined to execute the deed, and others having taken proceedings for the recovery of their debts, and a sale by public auction of the lands, pursuant to advertisement, having proved abortive, the present bill was filed. In this suit the mortgagees and the inheritor only were made parties Defendants; and the several scheduled judgment and recognizance creditors having been served with the notice prescribed by the General Order of the 22nd June, 1842, in reply, stated, that they did not require to be made parties under those circumstances.

1842.  
 HARVEY  
 v.  
 LAWLOR.  
 Statement.

The *Attorney General*, and Mr. *Jenkins*, for the Plaintiff, sought a decree as prayed. The terms of the Order of the 22nd June, 1842, were very general, and extended to such a case as the present; it says, whenever in a suit hereafter to be instituted for the sale of lands, it shall appear that there is any judgment or recognizance, which would or ought to be a charge on, or in any manner affect such land, the Plaintiff in such suit may cause a notice to be served upon such judgment and recognizance creditors as therein mentioned. And although, in general, previous to the making of this

Argument.

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v.

LAWLOR.

*Argument.*

order, where creditors are scheduled to a deed, executed for the purpose of creating a trust fund for their payment, they were necessary parties ; this order has substituted a more speedy and economical mode of proceeding against them, unless they require to be made Defendants, in which case it must be at the peril of costs.

Mr. *Butt*, for the mortgagee, *Uniacke*.

Mr. *Rogers*, for the mortgagees, The Provincial Bank.

Mr. *Savage*, for the Defendant, *Patrick Lawlor*.

*Decree.*

The Decree was as follows :—Let the trusts of the indenture, bearing date the 2nd of May, 1842, in the pleadings mentioned, or so much or such parts of them as are not capable of taking effect, be established and carried into effect under the directions of this Court as between the parties who have executed the said indenture. Refer it to the Master to take an account of the several lands and premises comprised in such indenture ; and to report under what title and how the same are held respectively, and in whose possession the said lands now are. And also to take an account of the rents and profits thereof, and by whom received, and of the amount of head-rent, and other outgoings now due and in arrear, for and in respect of the same, and of the costs, charges, and expenses properly and necessarily incurred by the Plaintiff, in making out title to the several lands and premises, and the sale thereof in the pleadings mentioned, and of preparing the said indenture, and otherwise in relation to the trusts thereof, including the costs :

to be paid by the Plaintiff to *Henry Bagge* in the pleadings named, and the sum of 100*l.* as compensation for the time and trouble of the Plaintiff in the premises, for acting as trustee of the said indenture of the 2nd of May, 1842. Let an account be taken of the sum due to the Plaintiff on foot of the judgment obtained by the said *Henry Bagge* against the Defendant, *Patrick Lawlor*, in the Court of Common Pleas as of Trinity Term, 1837, for the sum of 300*l.* debt, besides costs; and also an account of the several debts of the Defendant, *Patrick Lawlor*, comprised in the schedule annexed to the said indenture, and of what is now due and owing on foot thereof respectively for principal, interest, and costs. Let an account be taken of all charges and incumbrances upon or affecting said lands and premises, or any part thereof, and let the Master report the respective priorities. Let all parties have all just and fair allowances, and reserve all further directions, and the consideration of the costs of this cause until the return of the Master's report.

1842.  
HARVEY  
v.  
LAWLOR.  
Decree.

*Reg. Lib.* 87, fol. 8, 1842.

# MONTGOMERY v. SOUTHWELL.

THIS was an application under the General Order of the 22nd of June, 1842. The bill was filed for a sale of the estate of the Defendant, *Southwell*. In the month of June, 1836, a decretal order had been pronounced, directing an account on foot of the Plaintiff's demand, and of all prior and contemporaneous charges and incumbrances: under it the parties had proceeded, and on the 4th of May, 1842, the Master had made and signed his Report.

Nov. 30.  
In a creditor's suit this court, upon motion, with the consent of all parties, directed an account of judgments, affecting the lands to be sold, prior and contemporaneous with the filing of the bill.

1842.  
 MONTGOMERY  
 v.  
 SOUTHWELL.  
 Statement.

It appeared that there were a number of judgment creditors of *Southwell*, who were not parties in the cause, who being puisne to the Plaintiff's demand, had not produced their claim in the office.

An application was now made on the part of the Plaintiffs, that in addition to the accounts directed by the default order of the 14th of June, 1836, and notwithstanding signing and filing of the report, it might be referred to the Master to take an account of all judgment debts of the defendant, *Southwell*, prior to or contemporaneous with filing of the Plaintiff's bill, and the amount due thereon respectively, and the priority in which they respectively stood with regard to each other.

Argument.

Mr. *Nelson*, in support of the application, stated, that it had become necessary, in consequence of the recent decisions, that a title could not be made to a purchaser, without having all judgments on record affecting the lands satisfied, or at least the persons claiming such made parties in the cause, and consequently bound by the decision. The late General Order of the 22nd of June, 1842, see by its concluding clause (a) to provide for a case circumscribed like this: it directed, "that in any suit already instituted, any such creditor as aforesaid might, with answering or appearing at the hearing be at liberty to enter into the Master's Office, in manner and for the purpose aforesaid; and the aforesaid order should extend, as far as circumstances would permit, to any such creditor." If the Court declines to grant this application, the Plaintiffs will be obliged to file a supplemental bill to bring these parties before the Court.

(a) Vol. ii. pp. 1, 111.

THE LORD CHANCELLOR :—

1842.

The General Order was not intended to apply to suits already instituted. In this case there has been already a decree. The clause at the conclusion of the order, which has been referred to, was introduced by myself, and was meant to regulate suits, which had been just commenced, and would be in progress during the vacation ; but it has no application to suits, in which decrees have been obtained. The Plaintiffs are, in fact, seeking a supplemental decree upon motion. However, as there is no opposition, and as it will save much expense, if the parties are willing and competent to consent, I will make the order now sought.

MONTGOMERY  
v.  
SOUTHWELL.  
Judgment.

BALDWIN v. BELCHER ;

*In Re* CORNWALL a Bankrupt.

GEORGE CORNWALL, being a creditor of *William Baldwin*, obtained from him in the year 1832, assignments of two policies of insurance, which he had effected upon his own life. *William Baldwin* also conveyed to *George Cornwall*, his life estate in certain premises, to pay the premiums on the policies and the interest upon the debt. *George Cornwall* effected six other policies of insurance on the lives of *William Baldwin* and other persons.

Nov. 29.

Where there are two creditors who have taken securities for their respective debts, and the security of the first creditor ranges over two funds, while the security of the second is confined to one of these funds ; the court will marshal the assets so as to throw the person who has two funds liable to his demand, on that which is not liable to the debt of the second creditor.

*George Cornwall* being so possessed, and having occasion to borrow 5000*l.*, from his brother, *Henry Cornwall*, assigned to him these eight policies, by deeds bearing date the 13th of February, 1836, and on the same day, executed

The bankruptcy of the debtor will not prevent the application of the general rule, for the assignee stands in the position of the bankrupt.



1842.  
BALDWIN  
v.  
BELCHER;  
*In Re*  
CORNWALL.  
Statement.

to him, an assignment of the life-estate of *William Baldwin*, together with a mortgage of the lands of Tullyland. Subsequently, and in the same year, *George Cornwall*, mortgaged his equity of redemption in Tullyland, to *Thomas Wise*, for the sum of 6000*l*.

On the 16th of March, 1837, *George Cornwall* committed an act of bankruptcy, and on the 1st of July, in the same year, a commission was issued against him, and a person named *Robert Tresilian Belcher*, was chosen assignee. *William Baldwin* died in May, 1830, and a dispute having arisen between *Henry Cornwall*, and the assignee *Belcher*, as to whether the policies were in the disposition of *George Cornwall* at the time of his bankruptcy: the question was argued before His Honor, Mr. Commissioner *Macan*, in the month of May, 1839, who decided, that three of the policies had been well assigned to *Henry Cornwall*, but that the others were in the bankrupt's order and disposition, inasmuch as notice of the assignment of the latter had not been given to the insurance companies<sup>(a)</sup>.

The bill in the cause of *Baldwin v. Belcher* was filed by *Henry Baldwin*, against the assignee *Belcher*, *Henry Cornwall*, and others, for the purpose of raising family charges affecting the lands of Tullyland, which were prior to the mortgage of the 13th of February, 1836. A decree to account had been pronounced in the cause, and the accounts were in progress in the Master's Office.

The proceeds of the three policies to which *Henry Cornwall* had been declared entitled by the order of May, 1839, had

(a) See Lloyd & G. Ca. temp. Plunket, 446.

been invested in the joint names of the assignee *Belcher* and *Henry Cornwall*, and the lands of Tullyland being likely to prove insufficient to discharge both mortgages, a petition was presented on the part of *Henry Cornwall*, praying for an order, that he might be paid the produce of the three policies of insurance, and undertaking to give credit for the proceeds thereof in the said cause of *Baldwin v. Belcher*, and also in the bankrupt matter.

1842.  
BALDWIN  
v.  
BELCHER;  
In Re  
CORNWALL.  
Statement.

The *Solicitor-General* for *Henry Cornwall*.

Argument.

Mr. *Keller* for the assignee *Belcher*, contended, that though Tullyland would be sufficient to meet the amount of *Henry Cornwall's* claim, yet it would not be adequate to pay the second mortgagee, *Wise*, and consequently would be unproductive to the general creditors; and that, therefore, the policies, which were a fund available for the general creditors, ought not to be taken from them, for the benefit of the second mortgagee, who had no specific lien upon them.

Mr. Serjeant *Warren*, Mr. *Collins*, and Mr. *Jenkins*, for *Thomas Wise*.

The rule of marshalling applies; now the nature of the right is this, that where there are two creditors, one having single fund, the other having two funds; the single fund shall be protected against the creditor who has two. This protection must be given by paying the latter out of the fund, upon which the former has no lien. The interest of the general creditors cannot affect this right; *Aldrich v. Cooper(a)*, *Averall v. Wade(b)*.

(a) 8 Ves. 382, 389.

252; see also *Barnes v. Racster*,

(b) *Lloyd & G. ca. temp. Sugden*, 1 *Younge & C.*, C. C. 401.

1842.

BALDWIN  
v.  
BELCHER;  
*In Re*  
CORNWALL.  
*Judgment.*

THE LORD CHANCELLOR :—

This case stands thus. A person, who has since become a bankrupt, having certain policies of insurance, and also an estate, borrowed a considerable sum of money, the repayment of which he secured by a mortgage of the estate, and an assignment of the policies. He then executed a further mortgage of the estate alone, to another person, and subsequently became a bankrupt.

The estate of the bankrupt is insufficient for the payment of both the mortgages, and a contest ensues between the second mortgagee and the general creditors. The first mortgagee is not affected by this contest; he is to be paid the amount of his demand in the first instance.

The assignee who represents the general creditors, is not interested in the estate, which is not sufficient to satisfy the mortgages upon it, but he is deeply interested in the policies; and says it is hard that the second mortgagee should derive benefit from a fund not included in his security to the prejudice of the general *bonâ fide* creditors.

The rule of law is perfectly settled. If there are two creditors, who have taken securities for their respective debts, and the security of first creditor ranges over two funds, while the security of the other is confined to one of those funds, the Court will arrange or marshal the assets, so as to throw the person, who has two funds liable to his demand, on that which is not liable to the debt of the second creditor. Is there any thing to take the present case out of the operation of this general rule? The fact of the bankruptcy cannot have that effect. The assignee stands ex-

actly in the place of the bankrupt, and in no better position, and is bound in the same manner. As far as the deed of assignment is considered, its language is not peculiar; it contains the provision, that the amount of the policies shall go in liquidation of the charge.

1842  
BALDWIN  
v.  
BELCHER;  
In Re  
CORNWALL.  
Judgment.

The general rule must, therefore, be applied in this case in favour of the puisne mortgagee.

The order drawn up was as follows:—

“ Let *Robert Tresilian Belcher*, the assignee in this matter, forthwith join the petitioner in transferring to petitioner the proceeds of the policies Nos. 19273, 23079 and 23279, now standing in Government, new Three and a Half per cent. stock, in the joint names of *Robert Tresilian Belcher*, and the petitioner *Henry Cornwall*, and the dividends, that have accrued due since the investment of the same; and let the Master in the cause of *Baldwin v. Belcher*, in taking the account of the sum due to the petitioner on foot of his mortgage debt, charge the petitioner with the full amount of said stock, and the dividends due on same against his said mortgage debt: and declare *Thomas Wise*, the second mortgagee, entitled to the benefit of the transfer and payment heretofore directed to be made to the petitioner in preference to any claim of the said *Robert Tresilian Belcher*, the assignee of *George Cornwall* the bankrupt; and let the costs of this petition and motion be paid out of the fund.”

1842.

Nov. 30.

A bill of costs had been referred for taxation, and the parties agreed in the office upon the sum at which they were to be reported; subsequently the client having discovered certain entries, in his own handwriting, of advances made to the solicitor, and for which he had received no credit, applied that the costs should be sent back to the Master for taxation. The application was refused with costs.

## AUSTIN v. CHAMBERS.

THIS was an application on the part of the Plaintiff that Masters should be directed to tax the Defendant's costs, and that the Defendant should be obliged to give an account of credit on oath, and that the sum found to be due upon such taxation and of credits, should be the sum which the Master should report as due to the Defendant for such costs, notwithstanding the compromise entered into in the cause as to the amount at which such costs should be reported. The costs which were the subject of this motion, had been referred to the Master for taxation, but upon an arrangement in the office between the parties, it was agreed that the Defendant should take 500*l.* for the amount of his costs, without taxation. And accordingly the Master made a note in his book as follows: "December 11th, 1840. As to the costs claimed by *Chambers*, it is agreed by all parties, that I am to report 500*l.*, in full of all costs due to the present day."

It appeared from the Plaintiff's affidavit, that *Chambers*, the Defendant, had been his attorney from the year 1800 to 1819, and had, during that period, conducted a certain cause for him and his brother. That by the Defendant's answer in the present cause, he had claimed a sum on account of such costs, amounting to between 300*l.* and 400*l.*: but that by his discharge, he claimed a sum of 799*l.* 10*s.* 3*d.* That in this bill no credits were given; that in consequence of the embarrassments of the Plaintiff, prior to the year 1829, he was obliged to remove frequently from place to place to avoid arrest, and that he lost many of his vouchers; and that he, therefore, acceded to a proposal made to him by the Defendant, that the costs should

be reported at 500*l.* ; that such arrangement had been made on the supposition, that no money had been received by the Defendant, or any sum paid on foot of costs. That he had since examined the costs, and found many items objectionable ; among others, an item of the 30th of June, 1822, 22*l.* 15*s.*, paid to Mr. *Croker Barrington*, as for his expenses for coming from Cork : and again, fees to counsel 73*l.* That he had lately, within the last two months, among some old papers, found a memorandum in his own writing, containing an entry of disbursements made by him, and among others the following: " By payment to Mr. *Barrington*, from Cork, as a witness, 24*l.* By payment to Mr. *Chambers*, to pay lawyers' fees, 30*l.* : " and that the Defendant had not given the Plaintiff, in his bill of costs, credit for either of these sums.

1842.  
AUSTIN  
v.  
CHAMBERS.  
Statement.

The Plaintiff, by his affidavit, stated certain other credits, to which he conceived he was entitled, and that he was convinced he would be able to reduce the bill of costs considerably below 500*l.*

The Defendant, by his affidavit, stated, that it was true that the costs had been originally stated in his answer to amount to about 500*l.* ; but that at that time the costs were not made out, and that Defendant's estimate of them was founded upon a general notion of the probable amount, according to his general recollection of the business, and not from any regularly prepared bill. That the costs were subsequently made out and furnished in the month of September, 1839, amounting to the sum of 799*l.* 10*s.* 8*d.* That there was a long discussion before the Master upon the subject. That the Plaintiff first relied upon the Statute of Limitations. Then that the claim

1842.  
 AUSTIN  
 v.  
 CHAMBERS.  
 Statement.

should be limited to the sum stated by the answer. That both these matters having been overruled by the Master, the Plaintiff then insisted that he was entitled to large credits, but entered into no proof thereof. That the Plaintiff seeing that the costs must be taxed, and fearing that the expense would fall upon him, proposed a fixed sum of 500*l.*, which was finally agreed to by all parties. That it was now nearly two years since that arrangement had taken place; that on the 6th of May last, an application had been made to the Master to open the agreement; but that the Master had declined to entertain the proposition, and that the draft report was now prepared and settled.

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Mr. Serjeant *Warren* in support of the motion.

Mr. Serjeant *Keatinge*, and Mr. *Hawkins*, *contra*.

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*Judgment.* THE LORD CHANCELLOR.

In this case the client appears to have been sufficiently active for a considerable period of time. He originally filed his bill in this Court, for the purpose of setting aside a purchase, which had been made under circumstances, that he was advised rendered it liable to impeachment. There were two decrees against him in the Court below; first, upon an original hearing, and then upon a rehearing; but on appeal to the House of Lords<sup>(a)</sup>, those decrees were reversed, and certain proceedings were directed, by which the purchase was set aside, and an account for a long period back was directed. It appears that the costs, which are the subject of the present application, were incurred so

(a) 6 Clarke & F. 1.

far back as the year 1819, and by the answer of the Defendant in the cause, were stated to amount to a sum of between 300*l.* and 400*l.*, although the sum now reported to *Chambers*, for such costs, is 500*l.* Of this difference, however, I think, a satisfactory explanation has been given.

When the sum was stated in the answer, it was founded upon a general notion of the probable amount of costs, and not from any prepared account, which had not been regularly kept, as the solicitor did not suppose that his purchase would be impeached. Subsequently, however, after the decree in the House of Lords, and when the Defendant was obliged to have his costs regularly made out, for the purpose of taxation, they were furnished at a sum, in round numbers, of 800*l.* I do not mean to say, that the costs thus furnished were properly prepared: for no credits were given, and it is very improbable that during so long a period as from 1808 to 1819, the attorney received no remittances from his client. However, they were thus made out, all on the one side, leaving to the client *Austin*, to make out his credits in the best way he could.

Under these circumstances an arrangement was entered into, by which it was agreed that the costs should be reported at a sum of 500*l.* *Austin* alleges, that he has lately discovered, and now has in his possession, certain entries in his own handwriting, of payments and advances made to *Chambers*, during the period in which the costs were incurred, and for which he has received no credit; and I am now called upon to send these costs back to the Master for taxation. In the first place I would ask, how could these entries be any evidence for *Austin*? they are entries made by himself in his own private accounts, and in his own handwriting. They may be very satisfactory to his own mind, but it would be impossible to hold that they could be legal evidence for him as against *Chambers*. But still further, why were they not, if entitled to any weight,

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AUSTIN  
v.  
CHAMBERS.  
Judgment.



1842.  
 AUSTIN  
 v.  
 CHAMBERS.  
 Judgment.

produced before? These documents were not kept back *by* the solicitor: they do not come from his possession, *but* from the client himself. No satisfactory explanation on *this* point has been given: *Austin* had every opportunity *afforded* to him in the cause, in which he appears to have acted with great care and caution, and to have displayed no want of legal diligence. A deliberate compromise is entered into before the Master, and, I may say, at his suggestion; three-eighths of the solicitor's bill are cut off: the proceedings go on; nearly two years elapse; the report is prepared and initialed; and then, at the very last moment, the client thinks proper to come forward with the present application. He is, in my opinion, too late. If I were to comply with what he now asks, there would be no safety for mankind—there would be no end to suits. I must therefore refuse this application with costs.

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#### GENERAL ORDER.

30th November, 1842.

It is ordered, that whenever a mother shall be appointed by the Court guardian of her child or children, and shall afterwards, and during the wardship, marry again, such subsequent marriage shall, without delay, be brought by the guardian to the attention of the Master, to whom the matter stands referred; and, thereupon, the Master shall inquire and report, whether it is fit and proper that a new guardian should be appointed to the minor or minors, whereupon the Court shall make such order as shall be just: and in case this order shall not be complied with by the guardian, the Master shall not allow any payment for maintenance and education

to such guardian, subsequently to such marriage, without the order of the Court.

1842.  
GENERAL  
ORDER.

EDWARD B. SUGDEN, C.

HEMPHILL v. M'KENNA.

Nov. 19, 30 ;  
Dec. 2.

**T**HE bill in this case was filed on the 9th June, 1842, and it prayed that the Defendants, their servants, and agents might be restrained by injunction, from ferrying passengers for hire across the river Anna Liffey, with the Plaintiff's ferries, and from giving the Plaintiffs any disturbance in the possession and enjoyment thereof.

A possessory bill ought to state that the Plaintiff has been in the actual, quiet, and peaceable possession of the premises in question for three years at least before the filing of the bill, saving the disturbances given by the Defendant; and if there has been a mixed possession, partly by the Plaintiff and partly by the Defendant, so that it cannot be said that either of the parties had a triennial possession, this court will not interfere, but will leave the parties to settle their rights at law.

The bill stated, that his Majesty King Charles the Second, by letters patent, bearing date the 22nd of May, 1677, granted unto the Mayor, Sheriffs, and Commons, of the city of Dublin, and their successors for ever, the ferry or passage over the river Anna Liffey, together with the privilege of transporting, carrying, and recarrying all manner of passengers over the said water, and all fees, profits, and commodities and advantages, with the fee of one half-penny to be taken of every passenger, that should pass in any of the ferry boats over the said river; together with free liberty to erect one or more ferry boat or boats for the carrying and transporting all manner of passengers to and from the said city over the said water, to hold and enjoy the said ferries, and all fees, profits, commodities, and advantages, with the fee of one half-penny, or less (if less was then accustomed to be taken), of any passenger that should pass in the said ferry, unto the said Mayor, Sheriffs, Commons, and citizens, of the said city of Dublin, and their successors for ever.

When a Plaintiff comes for an *ex parte* injunction, he must state his case in the first instance fully and fairly.

1842.  
 HEMPHILL  
 v.  
 M'KENNA.  
 Statement.

The bill then stated, that his said Majesty, by his said letters patent, for himself, his heirs, and successors, did strictly charge and command, that no other person or persons, should at any time thereafter, exercise, keep, or maintain any ferry, boat, or boats, or carry over any person or persons whatsoever, for gain or hire, over the said river, at any place or places between the bridge of Dublin and the Ringsend, other than the Mayor, Sheriffs, Commons, and citizens, and their successors, or such person or persons as should from time to time be lawfully authorized under them.

The bill then alleged, that by indenture bearing date the 15th of August, 1835, the said Corporation demised to *William Walsh*, his executors, administrators, and assigns the said several ferries established and used on the said river, together with all and singular, the tolls, profits, and advantages, to the said ferries respectively belonging, to hold the same with the appurtenances, rights, and privileges thereunto belonging, for the term of ninety-nine years, from the 29th of September, 1817.

The bill then stated, that *William Walsh*, by his last will, bequeathed all his estate and interest in the said ferries and his right and title under the said lease of August, 1835, to the Plaintiffs *Richard Hemphill*, and *William Walsh*, upon trust for certain uses in the said will mentioned; and that he departed this life on the 13th of May, 1840, having appointed the said Plaintiffs the executors thereof; and that they duly proved the same.

The bill then charged that *Dennis Kenna*, one of the Defendants, having been for a considerable time in the

constant habit of carrying passengers for hire in boats across the said river, and within the said ferries, the Plaintiffs in Easter Term, 1841, brought an action on the case in the Court of Queen's Bench, against the said *Dennis Kenna*, for the disturbance of the said ferry : that said action came on to be tried at the sittings after last Hilary Term, on which occasion a verdict was found for the Plaintiffs.

1842.  
HEMPHILL  
v.  
M'KENNA.  
Statement.

The bill then charged, that notwithstanding that the said Plaintiffs had thus established their exclusive right to the said ferries at law, nevertheless, that the said *Dennis Kenna*, combining with *Bernard M'Kenna*, *John Spain*, and other persons, were in the daily habit of carrying passengers in boats for hire across the said river and within the Plaintiff's ferries, under the pretence, that there were not a sufficient number of boats kept by the Plaintiffs for the accommodation of the public ; the contrary of which the Plaintiffs charged to be the fact.

The above statement comprises the entire of the Plaintiffs' bill. On the 16th of June, the Plaintiffs obtained at the Rolls, a conditional order for an injunction in the terms of the prayer of the bill.

On the 25th of June, one of the Defendants, *Bernard M'Kenna*, filed an affidavit as cause against this conditional order. In this affidavit he stated, that he knew nothing of the alleged patent, and that he was advised that it was not competent for the Corporation to make any grant or demise to the Plaintiffs, or the persons whom they represented, conferring an exclusive or any right to the said ferries in question : that it did not appear by the recital of said alleged lease, that the lessors professed to demise anything more

1842.

HEMPHILL

v.

M'KENNA.

Statement.

than the ferries at that time established, by which was meant certain ferries situate on that part of the said River Liffey lying between Carlisle-bridge and the point opposite to the corner of Creighton-street, and which ferries were understood to be under the control and authority of the Corporation of the city of Dublin: that though attempts had been made by the Plaintiffs, yet, that the said Corporation nor any one claiming under them, had never pretended to have any right to, or authority over, any of the ferries situate beyond the corner of Creighton-street, on the east point of the river. That the ferries now sought to be disturbed by the Plaintiffs, were not situate within the limits hitherto understood and recognized as the part of the river on which the Corporation had a right to erect and use ferries; and that these ferries had been used and exercised for a period now beyond the memory of any person living, without any interference or disturbance on the part of the Corporation or any person deriving under them. That *William Walsh*, the lessee in the said lease of the 15th August, 1835, had never, during his life-time, claimed a right to these ferries; but that about a year since, the Plaintiff set up a ferry at a remote part of the east point of the river in which place no ferry had ever previously existed; that the same was done, as Defendant believed, for the purpose of giving a colour to the exclusive claim of right now asserted by the Plaintiffs, and for the purpose of creating embarrassment in the way of ascertaining the limits, within which the right now claimed should be confined, and whether the right was necessarily a matter of much doubt and difficulty from the changes which had occurred in the names and boundaries of the localities, existing at the time of the alleged grant.

With respect to the action at law, the Defendant in his affidavit stated, that he had heard and believed that the defence was most unsatisfactorily conducted, and that in consequence of the manner in which the question was presented to the jury, the verdict did not establish any such right as the Plaintiffs claimed, and he submitted that not being a party to the said action, he ought not to be bound by the said verdict. That it was untrue that Defendant was in the daily habit of transporting passengers in boats for hire across the said river, within the ferries of the Plaintiffs : for that he never did interfere with the ferries, which were recognized as the ferries belonging to the said Corporation : although the monopoly, which had existed as to these ferries, was productive of much public inconvenience and complaint, owing to the want of proper accommodation, and there not being a sufficient number of boats : that the Plaintiffs had lately instituted proceedings at law against him in the Court of Exchequer : that on the 28th of May, he had entered an appearance to the said action ; and that the Plaintiffs having filed a declaration against him, he had on the 17th of June pleaded thereto.

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HEMPHILL  
v.  
M'KENNA.  
Argument.

On the 3rd of November, the case was argued at the Rolls ; when his Honor was pleased to disallow the cause shown, with costs ; and the Defendant, *M'Kenna*, now appealed from the order of his Honor.

*Mr. J. J. Murphy* and *Mr. H. G. Hughes* for the appeal.

The order pronounced by his Honor cannot be supported. At the Rolls, the bill was treated as one in the nature of a possessory bill, and it was said that the Court, in such

1842.  
 HEMPHILL  
 v.  
 M'KENNA.  
 Argument.

cases, would always interfere by injunction. But this bill, in its present frame, cannot be sustained as a possessory bill, for the averment of a triennial possession, which is material, which is, in point of fact, the only essential characteristic of such a bill, is wanting; *Anon.(a)*, *Maple v. Vernon(b)*, *Joley v. Stockley(c)*, *Biddulph v. Molloy(d)*. In *Maple v. Vernon*, it is laid down that the general averment is not sufficient; but it must be shown that the Plaintiff has had an actual possession for that time, by himself or his tenants. In the present bill, no such allegation is to be found; and it therefore cannot be treated as a possessory bill; and consequently the order for an injunction cannot be supported. Again, if the bill be regarded as a common injunction bill, the order must equally fail. In such cases, it is essential that the Plaintiff should state his title with precision, to justify the interposition of the Court, *Whitelegg v. Whitelegg(e)*, *Morris v. Kelly(f)*; more especially when upon an *ex parte* application he asks the Court to grant the injunction. Here there has been a suppression of material facts; for the Plaintiffs have not informed the Court by their bill, that they were actually proceeding at law against the Defendant, *M'KENNA*, in respect of these ferries, and had filed a declaration against him a few days prior to the filing of the present bill. But, further, in the present bill, no exclusive occupation of the ferries is shown; and, on the contrary, the Defendant by his affidavit swears, that the ferries, now sought to be interfered with, have been enjoyed without disturbance by the Plaintiffs, or those under whom they claim, beyond the memory of any person now living. Now, when a right of

(a) 2 Ves. Sen. 414.

(b) 1 How. Eq. Exch. 316.

(c) 1 Hog. 247.

(d) 2 Ir. Eq. Rep. 228.

(e) 1 Bro. C. C. 57.

(f) 1 Jac. & W. 481.

*this* kind, which is analogous to a right of way, subsists, the Court will, after such a lapse of time, presume that there *has* been the concurrence of the parties, who could confer the right, *Rex v. Barr(a)*: and as the acquiescence, in fact, appears upon the face of the bill, the objection might have been taken advantage of by general demurrer, *Hoare v. Peck(b)*. But here, again, the mode in which this bill has been framed presents an obstacle to the Defendant, for it does not ask an answer. However, although the Defendant is prevented from demurring, the Court will not grant the injunction in such a state of things, *Parrott v. Palmer(c)*: and still more, where the legal right is at present undetermined, at least so far as this Defendant is concerned, who was not a party to the suit, in which the Plaintiff has already obtained a verdict, and which, at the very best, was unsatisfactory. Before the Court can be called upon to interfere by injunction, it ought, at least, to be satisfied that the legal right was clear beyond all controversy, *Lord Bath v. Sherwin(d)*, *Fitton v. Macclesfield(c)*, *Earl of Darlington v. Bowes(d)*.

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The *Solicitor-General*, and Mr. George for the Order.

The bill in this case states a grant from the Corporation of the ferries in question, to *William Walsh*, whom the Plaintiffs now represent. The right of the Corporation to make such a lease cannot be disputed. The letters patent, which are set out in the bill, are distinct and unequivocal, and the right of the Corporation is recognized in the Sta-

(a) 4 Camp. 16.

(b) 6 Sim. 51.

(c) 3 Mylne & K. 632.

(d) Prec. Chan. 261.

(e) 1 Vern. 287.

(f) 1 Eden, 270.



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tutes, 17 & 18 Geo. III. c. 10, s. 10, and 32 Geo. III. c. 35. As against this, what right or title has the Defendant shown? The action at law appears to be conclusive at that point; *Dennis Kenna*, who was the Defendant in the action at law, is also a Defendant in this suit, and he does not undertake to make any affidavit. In *Anon.(a)*, Lord Hardwicke says, that "before answer (the right appearing by matter of record) on filing the bill and affidavit," the injunction may be granted; and though in that case it was denied, it was because the affidavit was not sufficient. *Churchman v. Tunstal(b)*, *Paine v. Partrich(c)*. It is said that the Plaintiffs have not maintained a sufficient number of boats; even assuming the fact to be so, which is not the case, neglect on the part of the Plaintiffs will not destroy the right, or authorize such an intrusion on the part of the Defendant. In *Peter v. Kendal(d)*, Mr. Justice Baileys, in reference to an argument of this nature, says, "mere negligence of the party in whom the ferry is vested does not destroy the right." It is contended that the Plaintiffs have lost their right to the injunction by reason of proceedings at law, which they have recently instituted against the Defendant *M'Kenna*. In *The Attorney-General v. Nichol(e)*, Lord Eldon was of opinion, that the action at law which had been in that case commenced, made no difference; and he granted the injunction, and did not order the action to be discontinued.

THE LORD CHANCELLOR said, that as an ordinary injunction bill, the statement of title contained in it was insufficient; but that if the counsel for the Plaintiffs

(a) 1 Ves. Sen. 476.

(c) Carthew, 191.

(b) Hardres, 162; 2 Anstr.

(d) 6 Barn. & C. 703, 710.

608.

(e) 3 Mer. 687.

thought it could be supported as a possessory bill, he would allow the case to stand over to be argued by one counsel at each side, on the question of pleading.

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The *Solicitor General*, on this day, submitted that the allegation in the bill of the proceedings at law was tantamount to a statement of possession.

Mr. *J. J. Murphy* contended, that this was not sufficient, and that there should be a clear and distinct averment, and that too of actual possession.

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THE LORD CHANCELLOR :

Dec. 2.  
—  
Judgment.

The bill in this case, which was filed in June last, does not require an answer. It states the grant from the Crown, and the lease from the Corporation, under which the Plaintiffs claim. The lease is stated to be of the said several ferries established and used over the Liffey. It states that *Dennis Kenna* having been for a considerable time in the constant habit of carrying passengers for hire in boats across the Liffey, and within the said ferries, the Plaintiffs brought an action against him in Easter Term, 1841, for a disturbance, and in Hilary Term last, a verdict was found for the Plaintiffs. It then charges, that *Dennis Kenna*, *Bernard M'Kenna*, and others, are in the daily habit of ferrying passengers for hire across the Liffey within the said ferries. Now upon this bill so framed, the question raised before me is, whether an injunction, which has been obtained against *Bernard M'Kenna*, can be maintained? It is admitted that the bill in its present shape can only be supported as a possessory bill. In *Howard's Exchequer* the nature of a possessory bill is clearly ex-

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plained : it requires to be supported by an affidavit, that the Plaintiff has been in the actual, quiet, and peaceable possession of the premises for three years at least before the filing of the bill, saving the disturbances given by the Defendant. If there has been a mixed possession, that is partly by the Plaintiff, and partly by the Defendant, so that it cannot be said that either of the parties had a triennial possession, the parties will be left to settle their rights at law : and it is stated to be generally understood, that the application ought to be made within a year after the force or fraud committed. These bills have been common in this country, and the like bills may be filed in England<sup>(a)</sup> ; but in the course of my experience I do not remember such a bill. In refusing the Defendant's motion, the bill was treated as a possessory one, and the action was considered as proving the possession. But there does not appear to be such a case stated (and the affidavit, as read to me, was of course an echo of the bill) as brings the bill within the description, to which I have referred. There is no averment or proof of a three years' actual possession ; the action was, no doubt, proof of possession, but the statement of it in the bill did not prove a three years' possession.

Now the case so made, and upon which the injunction was obtained, is met by the Defendant's affidavit, which introduces new facts of importance. He believes, that the ferries, established at the time the lease was granted, were situate between Carlisle-bridge and Creighton-street ; but that until the recent attempt, the Corporation, or their lessees, never pretended to have any right to ferries situate beyond Creighton-street, on the east part of the river : he then swears, that the ferries sought to be disturbed by the

(a) 2 Ves. Sen. 415.

Plaintiffs are not situate within the limits, understood and recognized as the part of the river on which the Corporation had a right to erect ferries, and that he has heard and believes, that the ferries sought to be disturbed have been used and exercised for a period now beyond the memory of any living person, without any interference or disturbance on the part of the Corporation, or any person claiming under that body; and that the lessee never, during his life, claimed any such right, but confined himself to the ferries within the aforesaid bounds. He then states, that about a year ago, the Plaintiffs set up a ferry at a remote part of the east point of the river, in which place no ferry had ever previously existed: he says, he has never interfered with what he admits to be the Corporation ferries. He then states, that the Plaintiffs brought an action against himself, and that on the 28th of May he entered an appearance; that the Plaintiffs filed their declaration, and that on the 17th of June he filed his plea: the bill, I think, was filed on the 9th of June, and the conditional *ex parte* injunction obtained on the 16th of June.

The Plaintiffs ought not to have concealed the fact of the second action brought. The Master of the Rolls was not aware of that fact, until after he had delivered judgment, and he did not stop the action, nor did he intend to do so. But now it is objected, that the bill cannot support an injunction at all. The case made by the Defendant displaces any pretence that the Plaintiffs had enjoyed three years' undisturbed possession: it was, at most, a mixed possession, although within different limits.

The lease was produced, and it was found to contain powers to establish new ferries within the limits of the

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charter : but still the bill speaks of the Plaintiffs' established ferries, as if they covered the whole space, where seems plain, that until within a very recent period, ended at a certain spot, beyond which the right had been exercised by others. This is another instance, in the facts were not correctly stated, and they, who con an *ex parte* injunction, must, if they would maintain injunction, state their case in the first instance full fairly. The bill, for the reasons which I have said cannot, I apprehend, be supported ; and, therefore, the shown must be allowed with costs, and the Defendant also to have the costs occasioned by his being brought I give these costs upon the ground of the insufficient ment of the facts on the face of the bill, which has led the difficulties in the case.

*Order.*

Reverse the Rolls' Order, and let the cause shown against the conditional order, bearing date the 16th of June be allowed with costs, including the costs of this application. Deposit to be returned to Defendant's solicitor.

*Reg. Lib.* 1842, fol. 10

## REPORTS OF CASES

**ARGUED AND DETERMINED**

**IN THE**

HIGH COURT OF CHANCERY.

THORNHILL v. GLOVER.

THE original bill in this case was filed on the 13th of May, 1822, by *Edward Badham Thornhill*, for the purpose of setting aside a sale of the lands of Powerstown, which had been purchased by Mr. *John Glover*, in the year 1808, under a decree of the Court of Chancery.

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Nov. 22, 23.  
Principles upon  
which the  
Court acts in  
suits to im-  
peach pur-  
chases, made  
under a decree  
of a Court of  
Equity.

The bill stated, that by a deed of settlement, bearing date the 4th of August, 1745, and made between *Richard Thornhill* and *Sophia Thornhill*, otherwise *Badham*, his wife, of the first part; *Robert Deane*, *Samuel Raymond*, *Hartley Hutchinson*, and *Robert Gunn*, of the second part; *Eaton Stannard*, *John Kennedy*, *William Gunn*, and *Peter Daly*, of the third part: after reciting, that the said *Rich-*

the case took place in 1808. The present suit was instituted in 1822: and in 1823, the principal Defendant answered the bill: no further proceedings in the cause were had until 1839, when the suit was

revived;—*Held*, that as the circumstances were such that the purchase could not be sustained, the Plaintiff was entitled to relief notwithstanding the lapse of time.

Costs refused to both parties in consequence of the great delay.

Account of the rents directed only from the filing of the bill of revivor and supplement in 1839.

Form of the decree in such a suit.

The sale in this case took place in 1808. The present suit was instituted in 1822: and in 1823, the principal Defendant answered the bill: no further proceedings in the cause were had until 1839, when the suit was

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*ard* and *Sophia Thornhill* were respectively seised of certain lands and tenements therein mentioned, parts of which were fee simple, and part were leasehold interests for lives and years ; and that they had agreed to make settlements of the respective estates, so that same, after their respective deaths might go to their issue ; the lands of Castlekevin, and the lands of Powerstown (amongst others) situated in the county of Cork, which were the estates of *Richard Thornhill*, were settled to the use of *Richard Thornhill* for life, with remainder to *Stannard, Kennedy, Green, and Daly*, their executor &c., for the term of 500 years, upon trust, to secure a jointure for *Sophia Thornhill*, and a sum of 3000*l.* for the younger children of the marriage ; and subject thereto, the said lands were limited to the use of *Edward Badham Thornhill* (the eldest son of the said *Richard* and *Sophia Thornhill*) for his life, with remainder to his first and other sons in tail male with remainder to *James Badham Thornhill* (the second son) for his life, with remainder to his first and other sons, according to the usual course of family settlements ; with a ultimate remainder to *Richard Thornhill* and his heirs forever ; and, that by the said deed, the estates (which were the inheritance of *Sophia Thornhill*) were limited to the use of the said *Richard* and *Sophia Thornhill*, for their lives, and the life of the survivor, with remainder to trustees, for the term of 200 years, to raise 3000*l.* for the younger children, and subject thereto to the use of *Edward Badham Thornhill*, for his life, with remainder to his first and other sons in tail male ; with remainder to *James Badham Thornhill* for his life, with like remainders ; with a ultimate remainder to *Sophia Thornhill*, and her heirs forever.

The bill stated, that *Richard Thornhill* died some time

in the year 1747, leaving his two sons, *Edward* and *James*, and two daughters, *Sophia* and *Anne*, him surviving; having, by his last will, appointed the provision, made by the said deed of settlement for the younger children, to be equally divided amongst them, share and share alike; and that in or about the year 1790, *James B. Thornhill* filed his bill in this Court against the said *Edward Badham Thornhill* and others, for the purpose of raising by sale or mortgage, of the said terms of 500 years and 200 years, the sum of 2000*l.*, to which he, as one of the younger children, was entitled as aforesaid; that upon the 3rd of July, 1793, a decretal order was made, whereby it was referred to the Master, to take an account of what was due for principal, interest, and costs, on foot of *James's* share of said sum of 6000*l.*, and also on foot of a sum of 650*l.*, in the pleadings mentioned, as an old arrear of interest upon a part of said charge; and that whatever should appear to be due should be raised by a sale or mortgage of the said trust terms of 500 years and 200 years; that upon the 2nd of January, 1794, the Master made his report, and thereby ascertained that there was due to the Plaintiff in said cause, for principal and interest, the sum of 2856*l.*; and that upon the 1st of March following, a final decree was pronounced, directing payment of said sum, with interest and costs, by the said *Edward B. Thornhill*, within six months, or in default thereof, a sale of a competent part of the *Badham* and *Thornhill* estates; that the interest and costs on said sum amounted to a sum of 484*l.* 8*s.* 4*d.*, making, with the sum of 2856*l.*, a total of 3340*l.* 8*s.* 4*d.*; and that *Edward B. Thornhill*, and his son *Henry* (the Plaintiff's father), having effected a sale of several of the leasehold interests comprised in the deed of 1745, paid to *James B. Thornhill*,

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in the year 1795, a sum of 2740*l.* 8*s.* 4*d.*, on foot of his demand, thereby leaving due a sum of 600*l.*

The bill then stated, that the Plaintiff's father, *Henry Badham Thornhill*, the eldest son of *Edward B. Thornhill*, having attained his majority, joined with his father in taking the necessary steps to bar the entail, and that accordingly, by indenture of settlement of the 23rd of February, 1793, and executed by the said *Edward B. Thornhill* and *Henry B. Thornhill*, after reciting that recoveries had been suffered of said estates in due form, the lands were limited to trustees for the term of 300 years, and subject thereto, to the use of *Edward B. Thornhill* for life; with remainder to *Henry B. Thornhill* for life; with remainder to his first and other sons in tail male; with remainder to *Gerard B. Thornhill* for life; with an ultimate remainder to *Edward B. Thornhill* in fee; and the trusts of the term of 300 years were thereby declared to be, to enable the trustees thereof to raise, by sale or mortgage, in the first place, the sum of 3000*l.*, for such purposes as *Henry*, the son, should by deed direct; then a like sum of 3000*l.* for such purposes as *Edward B. Thornhill*, the father, should by deed direct; and thirdly, a sum of 6000*l.*, for such purposes as *Edward* and *Henry* should jointly in like manner appoint; and it was thereby also declared, that *Henry*, when in actual possession, should have power to charge the lands with a sum of 6000*l.*, without prejudice to any of the prior charges.

The bill then stated, that some time in the year 1798, settlement of accounts took place between *Edward* and *Henry*, by which it appeared that *Edward*, after debiting

himself with the amount of the produce of the leaseholds, and taking credit for the sum of 2000*l.*, part of the sum paid to *James B. Thornhill*, was indebted to *Henry* in a sum of 800*l.*; and that thereupon, by deed of the 1st of June, 1798, he charged the said term of 300 years with payment of said sum of 800*l.*, and appointed same to be paid to *Henry*; and by a further deed, of the 15th of March, 1799, *Edward* charged the said lands with the residue of said sum of 3000*l.*, which he was empowered so to charge under the deed of 1793, and appointed the same to his son, *Henry B. Thornhill*.

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The bill then stated two deeds, by the first of which, of the 22nd of November, 1798, *Henry* charged the said term of 300 years with 3000*l.*, and appointed same to be paid to *John Nash*, in trust for himself; and by the second of which, of the 23rd of March, 1800, executed subsequently to the death of his father, he charged the said lands with the 6000*l.*, and appointed this sum to be paid to the same trustee in trust for himself.

The bill then stated, that shortly after the decease of his father, *Henry B. Thornhill* became acquainted with Mr. *Glover*, then a practising attorney of very considerable skill and address, who resided, when absent from his professional occupation in Dublin, near the estates of the said *Henry B. Thornhill*; that the latter was a man altogether unacquainted with matters of business, and was involved in considerable pecuniary embarrassments; and that *Glover*, having become aware of those facts, and having contrived to insinuate himself into the almost unlimited confidence of *Henry B. Thornhill*, proposed to advance him money sufficient to relieve him from such pecuniary demands as were

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most pressing, upon condition that he would convey to him a part of the lands comprised in the deed of 1793, called the lands of Powerstown; that, pending the arrangement, *Glover* having purchased up a disputed title to a very old rent-charge or annuity of 60*l.*, affecting those lands (and which annuity had been for a long time the subject of litigation with the Plaintiff's ancestors, of which fact, the bill charged that *Glover* was perfectly well aware, inasmuch as he had been employed by the annuitants, to recover from the owners of this property the arrears of the rent-charge) for a sum of 500*l.*, insisted upon being allowed the sum of 1000*l.* out of the purchase money, in consideration of his releasing the Plaintiff's estates from the said rent-charge.

The bill then charged, that the Plaintiff's father, being completely under the control of *Glover*, in consequence of his pecuniary embarrassments, was obliged to consent; and that accordingly, by indenture of agreement of the 19<sup>th</sup> of April, 1805 (which instrument, the bill charged, was drawn up by the said *Glover* in his own handwriting, or by his directions, and without having been laid before any professional person on the part of *Henry B. Thornhill*), and made between the said *Henry B. Thornhill* of the one part, and the said *John Glover* of the other part, reciting, that *Henry B. Thornhill* had agreed to convey to *Glover* the fee and inheritance of the lands of Powerstown, for the sum of 4000*l.*; and that it was further agreed, that in consideration of 1000*l.*, part of said 4000*l.*, *Glover* should release the said annuity; the indenture witnessed, that in consideration of the said sum of 4000*l.*, to the said *Henry B. Thornhill* in hand paid, or well and truly secured to be paid, by the said *John Glover*, the said *Henry B. Thornhill* conveyed the said lands unto the said *John Glover*, his

heirs and assigns for ever, as his and their estate of inheritance in fee simple; that the said deed contained a covenant on the part of *Henry B. Thornhill*, that he had full power to convey said lands in fee simple, and that he would procure all parties to join, so that *Glover* should have a good absolute indefeasible estate of inheritance in fee simple; and further, that he would make out the title forthwith at his own expense.

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The bill stated that, though, of the balance of 3000*l.* in the said last-mentioned indenture stated, the sum of 100*l.* only was paid by *Glover*, which sum he, even at the time, refused to advance, unless *Gerard Thornhill*, the next brother of the said *Henry Badham Thornhill*, joined his brother in executing a bond to *Glover* for said sum, nevertheless, *Glover* entered into the possession and receipt of the rents and profits of the said lands, and had ever since continued in such possession.

The bill then stated, that *James Badham Thornhill* had died, leaving a sum of 600*l.*, on foot of his charge of 2000*l.*, due to him out of the estate of *Henry B. Thornhill*; that his widow, *Elizabeth Thornhill*, having obtained letters of administration, revived the suit, and on the 15th of July, 1805, obtained a posting for a sale of the lands of Castlevein; that the Plaintiff's father thereupon applied to *Glover* for so much of the purchase money as would discharge the demand of the said *Elizabeth Thornhill*, and that *Glover*, having promised to make inquiries as to the validity of the charge, subsequently informed him that same was subsisting, but that he had settled the said demand, and would charge the same in the purchase money of Powersown; the bill, however, averred that he did not pay same,

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but contrived to procure the said *Elizabeth Thornhill* to discontinue her proceedings.

The bill then charged, that *Glover*, having by the last mentioned proceedings discovered the pendency of the suit of *Elizabeth Thornhill*, and that the only means which the said *Henry Badham Thornhill* had of raising money to meet any sudden demand, was through the command of the said charges of 3000*l.*, 3000*l.*, and 6000*l.*; in order to place him altogether in his power, insisted upon his assigning over the said charges to him, and promised thereupon forthwith to pay over to him the balance of the said purchase money; and that accordingly, by deed of the 25th of October, 1805, the said three sums of 3000*l.*, 3000*l.*, and 6000*l.*, were assigned to *Glover* in trust for the better securing the said *Glover*, his heirs and assigns, a good and sure title to the fee and inheritance of the said lands of Powerstown, and for the indemnifying said *Glover* against all incumbrances affecting same, and against all expenses that he or they might be put to in discharging such lands from such incumbrances, and in making out an indefeasible title in fee simple unto said lands to said *Glover*, his heirs and assigns.

The bill then charged, that in consequence of *Elizabeth Thornhill* not having been paid the balance due to her, as the personal representative of *James B. Thornhill*, she obtained a posting for a sale of the lands of Castlekevin, and that *Glover*, in order to effect his object, and to procure a sale of the lands of Powerstown, altered the names of the lands, as stated in the said original posting, from Castlekevin to Powerstown; that the sale was advertised only in the newspapers which were published in Dublin,

and not in any of the Cork papers; and that the advertisements, which gave but a few days' notice, and too short a time to apprise persons resident in the county of Cork, of such intended sale, were inserted and paid for by *Glover* himself.

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The bill then proceeded to state the circumstances more immediately connected with the sale; that the only persons present at the sale in the Master's Office, were *Glover*, his writing clerk, *Meehan*, and a person named *M'Namara*, who was charged to have been produced by *Glover* himself; that *Glover* having bid the sum of 4000*l.*, the exact amount which he had agreed to pay in 1805, was declared the purchaser; that on the 3rd of February, 1808, the sum of 1000*l.*, being one-fourth of the purchase money, was lodged to the credit of the cause in the name of *Meehan*, as if he had been the purchaser, and that on the 19th of the same month, by a consent in the cause, it was agreed that *Meehan's* promissory note for the balance of 3000*l.* should be received. The bill charged that *Meehan* was since dead; that he was at the time a common writing clerk, and in insolvent circumstances, and that the promissory note still remained in bank to the credit of the cause; that by a further consent it was agreed that the said sum of 1000*l.* should be paid over to *Elizabeth Thornhill*. The bill charged that both these consents were prepared by *Glover*, and signed by him, as solicitor for the purchaser *Meehan*; and that he had prevailed upon the solicitor on record for the Plaintiff's father to sign same without his knowledge.

The bill then stated the deed of sale, the subject of the present suit, which bore date the 8th of March, 1808, and was made between *Dame Sarah Paul* (the administratrix of the

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surviving trustee, of the term of 500 years, created by the deed of 1745) of the first part, *Elizabeth Thornhill* of the second part, *Henry Badham Thornhill* of the third part, *John Meehan* of the fourth part, *John Glover* of the fifth part and *William Henn* (one of the Masters of the Court) of the sixth part; and after reciting several of the deeds and fact above stated, the decree for a sale, the subsequent sale and that *Meehan* was declared the purchaser, that "since the making of the said decree, the sum of 1756*l.* was advanced by the said *Henry B. Thornhill*, and for which he is entitled to credit; and that there now remains due to the said *Elizabeth Thornhill* a sum of 1100*l.* on foot of the sum so decreed to the said *James B. Thornhill* aforesaid;" and reciting "that the said *John Meehan*, with the consent and approbation of *Elizabeth Thornhill*, has paid out of his purchase money the sum of 3000*l.* to the said *Henry B. Thornhill*, and the sum of 1000*l.*, being the residue of said purchase money, into the Bank of Ireland to the credit of the cause;" the said deed witnessed, that in consideration of said sum of 4000*l.* "paid as aforesaid," the said parties of the first, second, and third part, with the consent of the said *William Henn*, conveyed the said lands of Powerstown to *John Meehan*, his heirs, executors, administrators, and assigns for ever. There was then a covenant by *Henry B. Thornhill*, that the term of 500 years was a good and subsisting one for the residue thereof; that the said parties, or some or one of them, had full power to grant and assign same; and for quiet enjoyment; and there was also a covenant on the part of *Henry B. Thornhill*, his heirs, executors, and administrators, at all times thereafter to warrant and defend title to said premises, and to execute all such further and other assurances, for the more perfectly granting and c

veying the said premises unto the said *John Meehan*, his heirs, executors, administrators, and assigns, according to the true intent and meaning of these presents. And then came a declaration on the part of *Meehan*, that the said purchase money was the proper money of *Glover*, and that said conveyance was made to him in trust for *Glover*.

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The bill then charged that the sale was fraudulent and void as against the Plaintiff, who was the eldest son of *Henry Badham Thornhill*, and first tenant in tail under the settlement of the 23rd of February, 1793, that the decree only warranted a sale of the trust terms created by the deed of 1746; that a much larger portion of the lands were sold than was required for the exigency of the decree, and that the sale was at an undervalue. The bill also charged that *Glover* had notice of the prior deeds of settlement.

The bill prayed that the sale might be declared fraudulent and void, and the deed of sale cancelled; that *Glover* might be ordered to execute a reconveyance to the uses of the settlement of 1793, and that the Plaintiff might be restored to the possession of said lands, according to his title under said deed; that *Glover* might be ordered to account for the rents and profits of said lands since the death of the said *Henry Badham Thornhill*, the Plaintiff undertaking to give *Glover* credit for all monies actually paid or fairly given credit for by *Glover* on account of his purchase money.

The Defendant *Glover*, by his answer, stated, that the agreement for the sale in April, 1805, originated with *Henry Badham Thornhill*; that at the period of such agreement he had but a slight acquaintance with the said



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*H. B. Thornhill*, and was ignorant of the circumstances of the property, and was not aware that the estates were bound by any deed of settlement; that *Henry B. Thornhill* had told him that he had full power to sell the same; that he was at the time an undertenant to part of the lands, and was acquainted with their impoverished condition; that he considered a sum of 3800*l.* would be a fair price for the lands, which were subject to a lease for three young lives, recently made at a rent of 200 guineas of the then currency, but that as the said lands adjoined the property of the Defendant's family, and were capable of improvement, he was induced to give the sum of 4000*l.*; the said *Henry B. Thornhill* accepting a conveyance of the rent-charge of 60*l.*, which issued out of his estates, at the price of 1000*l.*, to be allowed to the Defendant out of the purchase money (which proposal emanated, as the Defendant in his answer stated, from *Henry B. Thornhill* himself, and formed part of the original contract): that 500*l.* was to be paid at once, and the balance, 2500*l.*, when the title was completed; and that the agreement which was prepared in accordance with this arrangement, was in his possession and in his own handwriting.

With respect to the rent-charge, the Defendant stated that he became the purchaser of it in the year 1792, though he admitted that the conveyance itself was not executed until the 14th of June, 1805: that previously to such purchase the Defendant did, by the direction of the then owners, for whom he was professionally employed, offer to sell the same to the Plaintiff's grandfather, *Edward B. Thornhill*, for the sum of 500*l.*, and that it was in consequence of his refusal, that the Defendant himself became the purchaser thereof: that for a long time previously, the said

rent-charge had been the subject of law-suits with the Plaintiff's ancestors, there having been some claim of incumbrance affecting said rent-charge, or some set-off against same, but Defendant did not recollect or believe, that the validity of said rent-charge, or the title thereto, was ever disputed ; that after much litigation, the said rent-charge was established against the said claims, and that for many years prior to the execution of the contract of April, 1805, the Defendant was paid the amount of same by the said *H. B. Thornhill*.

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The Defendant, by his answer, admitted the circumstances as stated in the bill in reference to the proceedings in the suit of *James B. Thornhill* ; the revival of the suit, upon his death, by his administratrix ; and that a posting for the sale of the lands of Castlekevin had been obtained for the purpose of paying her the balance due on foot of her charge ; that then, for the first time, he was informed by the said *Henry B. Thornhill* of the existence of any such decree, and requested by him to purchase said lands ; upon which occasion the Defendant told the said *Henry B. Thornhill*, that if, upon examination, the said claim was a proper one, the lands of Powerstown might be sold, and a good title thus made out to Defendant ; that he was informed by counsel, before whom the proceedings were laid for advice, that a good title might be made to the lands in question by procuring them to be sold under the decree. That the Master was fully informed of the facts, and declared, that he thought that these lands ought to be sold instead of the lands of Castlekevin, provided this Defendant would undertake to bid for same a sum of 4000*l*. That, under these circumstances, the solicitor for *Elizabeth Thornhill* (and not the Defendant, as was represented by the Plaintiff) altered the names of the lands in the ori-

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ginal posting for the sale, and that this Defendant merely added thereto the number of acres contained therein that it was generally known that said lands were to sold, and that every person likely to become a purchaser was well aware that this Defendant had contracted to purchase same at the price of 4000*l*.

The Defendant, by his answer, further stated that he did not recollect or believe that *M'Namara* was produced by this Defendant at the sale, for the purpose in the bill mentioned: but he admitted, that having bid the sum of 4000*l*. for the lands in question by *Meehan*, who was his writing clerk, *Meehan* was declared the purchaser in trust for this Defendant; and that having lodged the one-fourth of his purchase-money, the sale was duly confirmed. He admitted the facts as stated in the bill with respect to the receiving of *Meehan's* promissory note for the balance of the purchase-money; that said note still remained in bank to the credit of the cause; and that *Meehan* was utterly unable to pay so large a sum: but he alleged that the same was done for the accommodation, and at the request of the said *Henry B. Thornhill*.

The Defendant, by his answer, admitted the execution of the deed of conveyance of the 8th of March, 1805. That no part of the said sum of 4000*l*. was then paid, inasmuch as the full amount of the purchase money had been previously paid to the said *Henry B. Thornhill* in the following manner: viz. 500*l*. on the occasion of the contract of April, 1805; 1000*l*. allowed for the purchase of the re-charge; 1100*l*. to Mrs. *Elizabeth Thornhill*; and the balance paid in cash at different times to *Henry B. Thornhill*, for his use, and for the costs of cases and opinions of counsel

to the title. The Defendant submitted that it was manifestly for the advantage of all persons interested in the estate that the inheritance of the said lands should be sold in preference to the trust term ; that the lands were sold at a fair public sale, and pursuant to the rules and practice of the Court, and that the decree warranted a sale of the inheritance ; that he was advised that the said decree was correct, and that he was fully justified in purchasing the inheritance in said lands under the same ; and that even if the decree was erroneous, the sale, by virtue thereof, could not now be affected or prejudiced by any such error.

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With respect to the several charges, amounting in all to 12,000*l.*, created by the deed of 1793, and which were assigned to the Defendant by the deed of October, 1805, in trust, for the better securing the said title to those lands, the Defendant stated, that he was applied to on the part of *Henry B. Thornhill*, in the year 1817, to re-assign the same, the Defendant having obtained, as was then alleged on the Plaintiff's part, an unquestionable title to the inheritance in said lands ; and that he agreed to re-assign the same, upon obtaining the opinion of counsel that he would be safe in so doing : that accordingly counsel having advised that he ought to execute a re-assignment, because his purchase was protected against all subsequent incumbrancers by the assignment of the term for 500 years under the decree by indenture of the 6th of January, 1818, after herein reciting that the amount of the purchase money had been long since paid to the said *Henry B. Thornhill*, the said Defendant re-assigned the said charges in trust for the said *Henry B. Thornhill*. That he never would have executed said deed if he had suspected that his purchase was to have been impeached. That he was induced to execute

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same by concealment and misrepresentation, and he admitted that he was entitled to a lien upon the said charge and to be indemnified thereout for any loss he should sustain by means of the present suit.

This answer was filed in the month of January, 1840, and from that period down to the year 1839 no further proceedings were had in the cause. On the 16th of January, 1839, the Plaintiff filed a bill of revivor and supplement, stating that *Glover* had died in the month of April, 1828, without lawful issue, and that by his will he charged the lands of Powerstown with payment of certain debts and with several legacies therein particularly mentioned, and among others, with a legacy of 500*l.* to his niece, *Elizabeth M<sup>c</sup>Fadzen*, and subject thereto, he devised these lands to trustees, upon trust for his representative son, *John Glover* (who was since dead) for life, with remainder to his son, *John Glover*, a minor (the present defendant), for life, with remainder to his first and other sons in tail male, with remainders over.

As an excuse for the delay which had occurred in the prosecution of the suit, this bill stated that the Plaintiff did not attain his age of twenty-one years until the year 1829; that the management of his affairs had been entrusted to the care of a solicitor, who, though repeatedly applied to on the subject, had postponed the interests of the Plaintiff, in consequence of his having been employed as solicitor for the Plaintiff in a certain cause of *Glover*, which was a creditor's suit, against the assets of the testator, *John Glover*, and one of the objects of which was to obtain a sale of these very lands of Powerstown

The parties to this bill were *John Glover* the minor, *Edmond Glover*, the heir-at-law of *John Glover* the testator, and *Andrew Lyons*, his personal representative, *John M'Fadzen* and *Elizabeth* his wife, and others: and it prayed that the Plaintiff might have the benefit of the proceedings already had, and for an account of the rents received by the said *John Glover*, the son of the testator; and that such sums as *John Glover*, the testator, had received in his life-time might be paid out of his personal estate, subject to the allowances offered by the said original bill; and that for that purpose an account might be taken of the personal estate and effects of the said *John Glover*, the testator; and that the present Defendant, *John Glover*, the minor, might be decreed to account with the Plaintiff for all rents received by him since the death of his father.

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On the part of the Defendant, *John Glover*, the formal minor's answer was put in, submitting his rights to the Court.

*John M'Fadzen* and *Elizabeth* his wife, by their answer, stated that the said *Elizabeth* was a creditor upon the estate of the testator *John Glover*, and was also entitled to the legacy of 500*l.*; that upon the occasion of their marriage, by indenture of the 9th of October, 1830, these interests were put into settlement, upon trust, for the benefit of these Defendants, and their children; and that they claimed to have the amount due raised out of the real estate of the testator *John Glover*, and paid to the trustees of the settlement. They further stated, that under the final decree in the cause of *Gregg v. Glover*, of the 1st of July, 1834, all the real estates of the testator, *John Glover*, had been sold, except the lands of *Powerstown*. That the

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fund in that cause was not sufficient to pay any of the legacies bequeathed by *John Glover*; and that, consequently, these Defendants were entitled to have the legacy of 500*l.* raised out of the lands of Powerstown.

These Defendants further stated, that they had no notice of the alleged rights of the Plaintiff; nor had they at the time of their marriage any notice that proceedings were pending for the purpose of impeaching the sale to *Glover* and they submitted that no step having been taken for more than seventeen years, during the greater portion of which time the Plaintiff was under no disability, the suit could not be considered as a *lis pendens*, and they relied on the statute of Limitations (3 & 4 Will. IV. c. 27) in bar of the relief prayed by the bill.

These Defendants further stated, that by indenture of lease dated the 1st of May, 1802, *Henry B. Thornhill* had demised these lands of Powerstown to *Michael Nash* for three lives, at a rent of 227*l.* 10*s.* late currency. That *Michael Nash* had sub-demised the same, by leases bearing date respectively the 30th of October, 1802, and the 21st of April, 1806; and that subsequently the said *John Glover*, the testator, had become the assignee of those two under-leases; that the *cestui-que-vies* in the original lease of the 1st of May, 1802, were still alive; and they submitted, that even though the sale to *Glover* should be declared to be void, nevertheless, that the lease of the 1st of May, 1802, must be held valid, and ought to be declared applicable to the purposes of the decree in *Gregg v. Glover* and that the said legacy of 500*l.*, and so much of the several sums, decreed to be charged on the lands of Powerstown, ought to be declared chargeable on the interest com-

raised in said lease, and ought to be raised by a sale hereof; and that whatever sum should be decreed to be payable on account of the purchase money of the lands of Powerstown should be declared applicable, if necessary, to pay the said legacy of 500*l.*, and the other legacies bequeathed by the will of the said *John Glover*.

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The decree of the 1st of March, 1794, was as follows:—after declaring the sum of 2856*l.*, the amount ascertained to be due to the Plaintiff, *James Badham Thornhill*, on foot of his charge, to be charged on the several lands and premises in the bill mentioned, it directed that the Defendant, *Edward Badham Thornhill*, should pay the same, with interest, within six months from the date thereof; and in default of his so doing, that the Master should set up and sell to the best and highest bidder the several towns and lands therein particularly mentioned, situated in the County of Cork, called the Thornhill estate; and also the several towns and lands therein also mentioned, situated in the County of Limerick, called the Badham estate, or so much of said two estates as should be sufficient to pay the amount of the Plaintiff's claim, with interest and costs; and that any surplus which might remain should be paid to the Defendant, *Edward B. Thornhill*, or such person as should appear to be entitled thereto.

The rest of the documentary evidence, will be found be sufficiently set forth in the previous statement of the findings.

Mr. Serjeant *Warren*, Mr. *Collins*, Mr. *Singer*, and Mr. *Wiley*, for the Plaintiff.



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The purchase in this case cannot be supported. The decree, under which *Glover* purchased, warranted only sale of the terms of years comprised in the original settlement of 1745. The conveyance, however, of 1808 *Glover* purports to convey the fee; and *Glover*, by answer, claims such absolute interest, and contends that under the decree, the parties were warranted in selling the fee instead of the terms. But, independently of this, the actual sale itself was fictitious, and contrived with the view of deceiving the Court. This distinctly appears from the proceedings in the cause immediately connected with the sale. In the posting of sale, the lands of Powerstown were substituted for those of Castlekevin; and though the charge in the bill, that this alteration was made by *Glover*, is not sustained, yet it appears that it was made with his knowledge and at his desire, in order to enable him to effect his object and purchase the lands. Again, it is clear that there was no sufficient notice of the intended sale, by advertisement or otherwise: the only bidders were *Glover* himself, *Meehan*, his writing-clerk, and a person of the name *Macnamara*, who is charged by the bill to have been an agent of *Glover's*, a charge which is most unsatisfactorily denied by the answer. Upon the whole, it seems to be quite clear that the interests of the several parties remainder, including the Plaintiff, who was then unborn, did not obtain that protection from the Court, to which they were entitled. In *Lord Bandon v. Becher*(a) Lord *Plunket* makes an observation, which pointedly applies to this part of the case. He says: "It is said no advantage has been taken; that there has been no undervalue. I will not proceed on that ground, but I say the person who has

(a) 9 Bligh, 532, 557; 3 Clark & F. 479.

right to the protection of the Court, the minor, has not received it: he could only get that protection under sales conducted openly and on fair competition; but I have as convincing evidence as could, at this distance of time, be produced, that these sales were not had in that way, in which the highest value could be got for the lands." In addition to these facts, how is the purchase money shewn to have been paid? The one-fourth was paid into Court, and has been applied, it is true, to the exigencies of the decree; but the remaining three-fourths, for which the promissory note of the clerk, *Meehan*, was lodged in Court, and which note, it is to be remembered, remains still in Court, are most unsatisfactorily accounted for. In the deed of 1808, it is stated that this balance was paid over to *Henry B.*

*Thornhill*, the tenant for life. Is it possible to conceive a greater fraud upon the Plaintiff, the tenant in tail in remainder? There is no report of the Master in the cause ascertaining priorities or allocating the funds; but the produce of the sale of the estate was handed over at once to the tenant for life, and placed within his unlimited control.

The principles applicable to cases of this kind are well established. The sale must be conformable to the decree, and a purchaser is bound to see that such is the case, *Colclough v. Sterum*(a). The Court never warrants the title, and, therefore, if there has been any fraud in obtaining the decree, the party purchasing under such decree, whose duty it was minutely to have examined the title, must suffer, *Colclough v. Bolger*(b). In this case the decree did not authorize a sale of the fee; but, even assuming that it

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(a) 3 Bligh, O. S. 181. See also *Bennett v. Hamill*, 2 Sch. & L. 566.

(b) 4 Dow, 54.

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did, it was a fraudulent decree against the present Plaintiff, because the parties in that cause were only entitled to a sale of the terms of years, and the pleadings shew that this was all they asked: *quacunque via*, therefore, the sale cannot be sustained. But then it will be said that, assuming the Plaintiff would have been relieved, had the transaction been recent, the lapse of time which has occurred is such as will justly disentitle the Plaintiff from requiring the interposition of a Court of Equity. It is to be remembered, however, that this suit was instituted in the year 1822, very shortly after the Plaintiff's right accrued, and quite within time; and the Plaintiff has, by his bill of revivor and supplement, satisfactorily explained, why the cause was not sooner brought to a hearing. At most, the delay can only affect the determination of the costs of the suit. In *Colclough v. Bolger*(a), the decree, which directed the sale, was pronounced in 1780: the report does not state at what precise time the sale took place, but it would appear to have been previous to the year 1786. The cause was not heard in the Court of Chancery until 1808, and in 1816 the House of Lords, reversing the decision of the Court below, set aside the sale. In *Cane v. Lord Allen*(b), the suit had been suffered to sleep for twenty-one years; yet this was not considered sufficient to disentitle the Appellant to relief, and that too in a suit the object of which was to enforce the specific performance of an agreement. Lord Redesdale says, "that no case had been stated, where the mere length of time, during which a suit had been kept depending, operated as a bar." An objection of this kind comes badly from a Defendant, who must be considered as guilty of ac-

(a) 4 Dow, 54.

(b) 2 Dow, 289. See *Giffard v. Hort*, 1 Sch. & L. 384.

quiescing in the delay, for, if he thought proper, he might have moved to have the bill dismissed for want of prosecution.

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The *Solicitor-General*, Mr. Serjeant *Keatinge*, and Mr. *Wall* for the minor Defendant, *John Glover*.

If the purchase in this case is not upheld, it will have the effect of introducing great doubt and uncertainty into sales under a decree of a Court of Equity. It is quite true, that the Court does not warrant a title purchased under its decree, and will set aside such a purchase, where the proceedings have been fraudulent, or the conduct of the parties collusive: but before the Court is called into activity for the purpose of rescinding all that has been done under its solemn order, it should require the most unequivocal testimony, that fraud was intended and actually perpetrated.

In the present case it is rather difficult to understand how the Plaintiff has been injured. No case of undervalue has been made out. It seems to be admitted that Mr. *Glover* gave the full value for the fee-simple of the lands of *Powerstown*. It is said that there was not sufficient notoriety given to the sale, that advertisements of the sale appeared only in the Dublin newspapers, and not in those which were published in the city of Cork. This is an unmeaning complaint, when once it appears that the lands were sold at their full value: but even independently of this, the proper advertisement of such sales is always a matter for the Master's discretion; and it is a strong measure, particularly now, after such a lapse of time, to seek to affect a purchaser by reason of the negligence of an officer of the Court, if negligence it can be fairly called.

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To what, then, is this case reduced?—that the fee-simple of certain lands was sold, whereas the term of 500 years ought only to have been sold. Mr. *Glover*, in his answer, states, that when he entered into the contract of April, 1805, he was not aware of the circumstances of the property, or that the estates were bound by any deed of settlement. He entered into a fair contract for the purchase of the fee-simple, and if there was any deception practised, it was on the part of the Plaintiff's father, who was aware of the settlement by which those lands were limited, but thought proper to suppress the fact of its existence, when Mr. *Glover* entered into the contract of 1805. In addition to all this, it is to be remembered that the Court is called upon to set aside a sale after an interval of more than a quarter of a century, during which period the property has been made the subject of settlement and other disposition. Such a lapse of time is fatal to the Plaintiff's claim; the parties themselves are long since dead; and all the evidence has perished, which possibly might throw light upon the transaction. Under any circumstances, however, the Defendant will be entitled to be recouped for the amount of the purchase-money, out of the several charges, amounting in all to the sum of 12,000*l.*, created by the settlement of 1793, and assigned to *John Glover* by the deed of October, 1805.

Mr. *William Brooke* and Mr. *Rogers*, for the Defendants, *M<sup>r</sup> Fadzen* and wife, submitted that they were purchasers for valuable consideration under the settlement of the 9th of October, 1830, and though it was true that when the settlement was executed there was a *lis pendens*, yet there was not “such a close and continued prosecution of the *lis pendens*” as was sufficient to affect them; and the

is point, Lord *Bacon's* rule(*a*), *Preston v. Tub-*  
*rel v. Carpenter*(*c*), *The Bishop of Winchester v.*  
*Kinsman v. Kinsman*(*e*), *Landon v. Morris*(*f*),  
*Treatise on Vendors and Purchasers*(*g*).

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*lins* in reply.

D CHANCELLOR :—

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case I have to express my strongest disappro-  
 proceedings like the present. Nothing can be  
 ning than for the Court to find itself called upon  
 e a sale at such a distance of time as has been  
 to elapse since the filing of the bill in the present  
 such proceedings were of frequent occurrence,  
 be necessary to have a statute of limitation for  
 ie proceedings within this Court, and to prevent  
 being revived after having been allowed to lie  
 or years(*h*). It is said that a Defendant may  
 order to compel the Plaintiff to revive within a  
 e, or have his bill dismissed; but we all know  
 fendant in such a case naturally lies by; being  
 ion, and having a colour of title, he is quiescent  
 s he is allowed to remain so, fearful that if he  
 step, he may rouse the sleeping lion, as it is said.  
 sent case, had the transactions been recent, they  
 ich as this Court could have permitted to stand;  
 ithstanding that the case is now for the first time  
 o a hearing after twenty years of inert litigation,

ies, Orders, p. 7.  
 n. 281.  
 Wms. 482.  
 s. 194.

(*e*) 1 Russ. & M. 617.  
 (*f*) 5 Sim. 247.  
 (*g*) Vol. iii. p. 459, 10th ed.  
 (*h*) See General Orders, 1843,  
 Nos. 58 and 81.

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I must, though with great reluctance, interfere and set aside this sale.

The facts are these. Estates, of which the lands in question form a part, together with some leasehold interests, had been settled at an early period by a family deed in 1745, in strict settlement, upon *Richard Thornhill*, the great grandfather of the Plaintiff, and *Sophia Badham* his wife, and their issue. *Edward Badham Thornhill* was the eldest son of *Richard* and *Sophia Thornhill*, and was tenant for life under this settlement; and *Henry Badham Thornhill*, his eldest son, the Plaintiff's father, was entitled to the first estate tail in the freeholds, and the absolute interest in the leaseholds, subject to the life-interest of the father. They thus had amongst them a complete power of disposition over both estates. In the year 1793, *Richard Thornhill* being dead, and *Henry Badham Thornhill* having attained twenty-one some time in the preceding year, a recovery was suffered, and the fee-simple estates were re-settled, subject to the life estate of the father *Edward*, upon *Henry Badham Thornhill* for life, with remainder to his first and other sons in tail. This settlement, however, did not comprise or in any way refer to the leasehold interests. In the year 1790 a suit had been instituted by a child, *James Badham Thornhill*, who was entitled to a portion under the early settlement of 1745, to raise the amount of that portion, and a decree was pronounced in that suit in the year 1794, for the sale of so much of the settled estate, as would be sufficient to discharge the amount of the demand. When the estates were re-settled in 1793, a term of three hundred years was created, the trusts of which were, to enable the trustees to raise a sum of 3000*l.* for such purposes as *Edward Badham*

*Thornhill* the father, and first tenant for life, should by deed direct: another sum of 3000*l.* for such purposes as the son *Henry* should in like manner appoint: and lastly, a further sum of 6000*l.* for such purposes as the father and son should also by deed appoint. Mr. *Glover*, who is represented to have been a solicitor, and who resided in the neighbourhood, was anxious to become the purchaser of one of the denominations included in the settlement, called the lands of Powerstown, and he entered into an arrangement in the year 1805 with *Henry Badham Thornhill*, who was but tenant for life under the settlement of 1793, of a singular character. It was a most improper transaction for a man filling the character of a solicitor to be concerned in; for although no money was paid, and the whole matter rested *in fieri*, he took an actual conveyance as if of the fee from a person, who was but tenant for life, and there is a covenant in the deed to do all acts which may be necessary, “so that the said *John Glover*, his heirs and assigns, shall have a good, absolute, indefeasible estate of inheritance in fee-simple” in the lands thereby conveyed. The conveyance ought to have been contemporaneous with the payment of the purchase money. This conveyance put it into the power of the purchaser to defraud the seller, by conveying the estate to a purchaser without notice.

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After the execution of this deed, Mr. *Glover* discovered that the person, with whom he was dealing, *Henry Badham Thornhill*, was only tenant for life, and he consequently proceeded no further with his contract. But the family suit for the raising of the portion, which had not, in the mean time, been proceeded with, was revived, and in the month of July, 1805, a posting was obtained for a sale of that portion of the estate included in the original settle-



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ment of 1745, and also in the settlement of 1793, called the lands of Castlekevin; and the sale was regularly advertised in the usual manner in the public newspapers. It is clear that the settled estate would have had to bear the burden of raising the portions charged upon it by the sacrifice of a part sufficient to satisfy the demand.

In that state of things it occurred to Mr. *Glover* and the tenant for life, that by substituting the Powerstown estate for the estate which was directed to be sold by the decree, they might make a good title to the Powerstown estate; and if this plan had been regularly carried on, I am far from saying that it would not have been a fair and legitimate arrangement; because it was indifferent,—or rather it was not indifferent, for the Powerstown estate was much more fit to be sold than the Castlekevin estate, which was the family estate, and upon which stood the family mansion,—but it was at least indifferent to the children by sale of what part the portions were to be raised, if the property allotted was sufficient to answer their claims. But it was necessary that the sale should be fairly conducted. Now from everything in the cause, it appears that the sale was not fairly conducted; the time for the sale was so short as to shew, that it was not the object of the parties to invite competition. Supposing 4000*l.* to be the value of the Powerstown estate, as it has been argued, it was nevertheless intended, through the instrumentality and by the machinery of the Court, to obtain a good title to Powers-town, which could not otherwise be transferred; and, supposing that everything had been regular, and that the sale had been fairly conducted, the contrivance might have been effectual; but it is impossible for the Court to allow a sale of this description, which is a mere mockery and not

a real sale, to stand for one moment. How were the proceedings at the sale itself conducted? As there is a rule of the Court requiring that there should be three bidders, three bidders were procured to effect a seeming compliance with the rule: one of them is Mr. *Glover* himself, the second his clerk *Meehan*, and the third a person named *Macnamara*. The account which *Glover* has given of the latter in his answer is most unsatisfactory, and leads to the conclusion, that he was a person sent there for the purposes of Mr. *Glover*. There is not any direct proof that such was the case; but the answer is not such an answer as it would have been, were the fact otherwise; for instead of speaking as to his belief and recollection, as he does, he would have said, that Mr. *Macnamara* was a stranger to him, and came as an intended purchaser, and was not brought there by him to form one of the three bidders. The result, of course, was, what had been intended, that Mr. *Glover*, through his writing-clerk *Meehan*, was declared to be the purchaser for 4000*l*. In the face of the Court (and this is very important) the whole matter was regularly and fairly conducted; and according to the rules of sale, *Glover*, through *Meehan*, brought in 1000*l*., the fourth of the purchase money, and he obtained an order *nisi* to confirm the sale in the usual course: and then, with the consent of the parties, the promissory note of the clerk, as the nominal purchaser, which in all probability was not worth the value of the paper upon which it was written, was accepted for the remaining three-fourths of the purchase money. This note was accordingly paid into Court, and with a just appreciation of its value, it has been suffered to remain there from that time to the present moment. The absolute order was subsequently obtained. As far, therefore, as appeared to the Court, all the conditions, which it requires to be com-

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plied with, were performed: all the forms, which it interposes for protecting the sale of a settled estate, were strictly adhered to.

But let us now see what the real transaction was which took place behind the back of the Court. By the deed of 1805 a sum of 500*l.* had been paid down, and for the repayment of that sum *Glover* obtained the security of the seller and one of his brothers, by a bond and warrant of attorney, precisely as if the transaction had been a loan. That proportion of the purchase money was paid to the tenant for life, but it never was brought into Court; it never became a payment to the credit of the estate. A sum of 1000*l.* was really paid by *Glover* into Court, and that was a proper and *bond fide* payment, and must now be considered as a valid claim against the estate. But what other sums were paid? How is the balance of the purchase money accounted for? The way in which it is stated in the deed of the conveyance is this,—and I read this deed with great regret, as its very frame ought to have suggested to the Master the nature of the transaction, and shewn to him that the proceedings were not duly conducted, and that he had no authority to execute such a deed. Had there been proper vigilance and caution on his part at that time, all the litigation, which has since ensued, would have been prevented. Upon the face of the deed it is stated, that 1756*l.* had been paid to the portioner, *James Badham Thornhill*, by the tenant for life himself, and “for which he was entitled to credit,” without saying against whom, or against what fund, and that 1100*l.* still remained due to *Elizabeth Thornhill*, who was the personal representative of *James Badham Thornhill*, on foot of the sum decreed to him. This deed then recites that the purchaser had

aid 1000*l.* into Court, and that he had paid, “ with the consent and approbation of the said *Elizabeth Thornhill*,” the remaining 3000*l.* to the tenant for life. Now where was the authority to the Master to execute a deed giving away the estate of the remainder-man for money paid to the tenant for life? Supposing that the money had been paid, as it was stated to have been, by the tenant for life in payment of the portions, the Master had no power to give him credit for it out of the purchase money. The Court never permits one shilling of the purchase money to go in payment of any incumbrance, which does not appear upon the Master’s report. How the Master could have permitted all this to be done, I am at a loss to conceive: it was against the rights of the parties, and contrary to the rules of the Court to do so, and cannot be sustained. But now observe how untrue was that recital. The 3000*l.*, in point of fact, was never paid to the tenant for life. I asked by what means was that payment made out? From some circumstances in the case, and by adding together sundry sums, the counsel for the Defendant endeavoured to make out that this sum of 4000*l.* was paid; but there is nothing to shew that the sum stated in the purchase deed was ever *bond fide* paid to the tenant for life. The real transaction was this: 500*l.* had been paid by *Glover* to *Henry Badlam Thornhill* in 1805, upon the occasion of the earlier contract between them. This sum therefore got into the hands of the tenant for life: then 1000*l.* had been paid into Court. This was appropriated by an order of the 19<sup>th</sup> of July, 1808, in discharge of 1100*l.*, the balance of the sum reported due to *Elizabeth Thornhill*, the personal representative of the portioner, and at this distance of time it may be assumed that she relinquished her claim to the 100*l.* in favour of the purchaser: that would make a sum

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of 1600*l.* There was then another transaction out of Court which was this : it appears that by a very early deed executed in the beginning of the eighteenth century, there was created a perpetual rent-charge of 60*l.* per annum affecting the settled estate. This rent-charge *Glover* bought up as early as the year 1792, he says, although the conveyance does not bear date until the month of July 1805. Having, however, purchased up this annuity 500*l.*,—and I have nothing to do with what sum he paid for it,—it was part of the terms between him and the tenant for life, that it should be considered value for 1000*l.*, the purchase money to that extent be satisfied. If we add this 1000*l.*, not paid by *Glover*, but satisfied by release of the annuity, a sum of 2600*l.* will be accounted for. But as to the remainder of the purchase money would be necessary to go into a very long account of dealings between the tenant for life and *Glover* in order to see how the balance was discharged. But how would that help the present case? All such dealings would, no doubt, constitute a part of the account between *Glover* and the tenant for life, but it never could be said that as between the purchaser and the settled estate, the estate got the benefit of any of such payments. I would observe as to the sum of 1756*l.* for which *Glover* now seeks to get credited a circuitry, that this sum was part of the portion due to *James Badham Thornhill*, and had been paid in this manner. In the early part of the year 1798 the father, and the *Henry Badham Thornhill*, who had the absolute dominion over the leasehold estates between them, joined in a conveyance of these leaseholds, which were not included in the deed of re-settlement of 1793, for a large sum; and they set off accounts between themselves, and in settling these accounts an item of payment of 2000*l.* to *James Badham Thor*

as part of the portion due to him, is brought in as a charge. Now the son, who was then tenant for life of the real estate, by the operation of the deed of 1793, could no more charge that sum against the settled estate than the father could. The father and son had the power of disposing of the leasehold estates between them: one could not do so without the concurrence of the other: it was not the case of a tenant for life paying off an incumbrance, but the payment of the portion was a transaction between them, by which they agreed to relieve the settled estates out of the leaseholds, and it would have been a surprise, I think, to the father, to find the son afterwards setting up the amount, which had been so paid, as a valid incumbrance against the settled estates; and it certainly would require a great deal of evidence to shew, that the son was at liberty to charge this sum of 2000*l.* against those estates. The account, as settled, shews a balance of 800*l.* against the father; and the father accordingly executed his power which he had under the deed of 1793 by charging the settled estates for this balance of 800*l.* in favour of the son; and this concluded the dealings between the father and son. Upon the first arrangement between *Glover* and the tenant for life, *Glover*, in order to secure to himself the benefit of his purchase, took assignments of the charges to the amount of 12,000*l.*, with which sum the father and son, under the deed of 1793, were empowered to charge the settled estates. It is said, that at a subsequent period the purchaser was induced to give up these charges, upon the supposition that he had obtained a good title, and that he did not any longer require them. That is, no doubt, a great hardship, and one of the consequences of the lapse of time, which has been allowed to occur in this case; because, if he had retained those securities, I do not see how

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he could have been prevented from recouping himself of them. But he has thought proper to part with them and it is not in the power of the Court, in this suit, restore them to him.

By the deed of 1808 the tenant for life, and the trustees of the term for five hundred years, and the portions assume to convey the property to *Glover* absolutely, if they were seised in fee. The effect of that conveyance, in point of law, is clear enough; it was not a conveyance of the fee, but a transfer of the 500 years term and the life estate of the tenant for life, under the settlement of 1793. There is no doubt as to its legal operation but what was intended to be its operation is quite another question. It appears to me that the intention was to acquire whatever interest could be transferred; and, though they knew they had no right to convey further than the 500 years term, yet they give to the deed the appearance of a conveyance in fee. The covenant for further assurance is general, and would extend to a conveyance of the fee, if the parties had it to convey. It is clear from the deed of 1805 that Mr. *Glover's* object was to obtain a conveyance of the fee. Upon the whole of the case it appears beyond dispute that the machinery of the Court was resorted to to validate a sale made, not by the order of the Court, but by a contract entered into behind the back of the Court, and therefore it is impossible for me, without violating all the rules of the Court, to uphold the transaction as a sale properly had under the decree. The tenant in tail says, that this contract was not binding upon him and that he is entitled to set it aside; and though it is to be deplored that the Court should be required to interfere after such a lapse of time, yet I cannot allow any sum

feelings to interfere with the rules of the Court and the strict rights of the parties. "I must not," as was once observed by a learned judge, "steal leather to make poor men shoes(a)." I shall, however, restrict the decree as much as I can. If I were to send the case to the Master, to inquire what sums were properly paid in discharge of the incumbrances affecting the inheritance, and what were the rights of the purchaser, I should only open a course of litigation, which probably might last for another twenty years. What I mean to do is this: I shall direct an account of the rents to be taken from the time of filing of the bill of revivor and supplement in 1839, and as, against that, the Defendants are to have credit for the sum of 1100*l.*, as having been properly paid to *Elizabeth* in 1808, and also for the sum of 1000*l.*, part of the purchase money which was agreed upon as the sum payable for the annuity of 60*l.*; but as there is no account of the rents directed before that time, the Defendant cannot claim interest upon her of those sums before 1839: from that time they are to bear interest at five per cent.

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I shall give no costs to either party in consequence of a great delay. There must be a re-conveyance of the lands, subject to the lease of May, 1802, and to all under-leases made during the continuance of that lease; and, if necessary, the Plaintiff must undertake to confirm those under-leases(b).

Declare the sale of the lands of Powerstown, in the Decree. Readings mentioned, made to *John Meehan* in trust for

(a) Attributed to Mr. Justice 1 P. Wms. 765.  
widen by Lord Harcourt in (a) See *Gibson v. D'Este*,  
the Attorney-General v. Sutton, 2 Younge & C. C: C. 542.



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*John Glover* deceased, both in the pleadings named, void as against the Plaintiff in this cause; and declare the conveyance of the said lands, bearing date the 8th of March, 1808, made to the said *John Meehan*, as such trustee, in like manner void as against the Plaintiff: and let a reconveyance of said lands be executed to the Plaintiff by all proper and necessary parties, upon the terms hereinafter mentioned. Declare the Defendant, *John Glover*, a minor, as devisee, and the Defendant, *Andrew Lyons*, the personal representative of the said *John Glover*, deceased, entitled to credit as against the Plaintiff for the principal sum of 1100*l.* late currency paid by the said *John Glover*, deceased, to *Elizabeth Thornhill*, deceased, the widow of *James Badham Thornhill* in the pleadings named; and also entitled to credit for the principal sum of 1000*l.* of the like late currency, as and for the purchase of the annuity of 60*l.* per annum, affecting the said lands of *Powerstown*, with others, and as formerly vested in *Mary, Sarah, and Jane Barter*, and by them conveyed to the said *John Glover* by the deed bearing date the 14th of June, 1805, in the pleadings mentioned, together with interest on said principal sums of 1100*l.* and 1000*l.*, at the rate of five per cent. per annum, from the 16th of January, 1839, being the day of the filing of the Plaintiff's bill of revivor and supplement in this cause; and declare the Plaintiff entitled to an account from the said 16th of January, 1839, of the rent of said lands, as reserved in and by the lease thereof in the pleadings mentioned, bearing date the 1st of May, 1802, executed by *Henry Badham Thornhill*, the Plaintiff's father, to *Michael Nash*, for the lives of *William Nash, Patrick Nash, and Wallis Adams*, at the yearly rent of 227*l.* 10*s.* of the like late currency of Ireland, and that the said rents be set off, according to the course of the

Court, against the said two principal sums of 1100*l.* and 200*l.* hereinbefore mentioned, and the interest thereof, up to and for the 29th of September last, being the last half-yearly gale day under said lease ; which being done in open Court, the balance remaining due to the said Defendants amounts to the sum of 1486*l.* 3*s.* 10*d.* : and let the Plaintiff, within six months from the date of this decree, invest, with the approbation of *Thomas Goold*, Esq., the Master in this cause, the said sum, with interest thereon, from the said 29th of September last, at the rate of five pounds per cent., until such investment in the purchase of Government Three-and-a-half per cent. stock, and transfer such stock, when so purchased, with the privity of the Accountant-General of this Court, to the credit of this cause ; and thereupon let the reconveyance of said lands of Powerstown hereinbefore mentioned be executed to the Plaintiff by all proper parties, together with a proper conveyance of the said annuity of 60*l.* per annum hereinbefore mentioned, and refer it to the Master to settle and approve such deeds, in case the parties differ about the same. Declare the said reconveyance of said lands to be subject to the aforesaid lease of the 1st of May, 1802, for the term of three lives hereinbefore mentioned : as also to any under-lease made of the lands comprised therein during the continuance of the said lease of the 1st of May, 1802, but no longer ; and let the Plaintiff, if so required, confirm any such under-lease for the term aforesaid, but no longer. And his Lordship doth not think fit to give to either party his costs, except the Defendant, *Edmund Glover*, who is to be paid his costs out of the funds in this cause. Let the several Defendants in this cause, and who are parties to the cause now pending in this Court for the administration of the estate and effects of the said *John Glover* deceased,

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and wherein *Barry Gregg* and others are the Plaintiffs, and the said *John Glover*, a minor, and others, are Defendants, be at liberty to apply, as they may be advised, to have the said fund hereby directed to be brought to the credit of this cause transferred to the credit of the said cause of *Gregg v. Glover*, and to apply to have their costs as Defendants in this cause, paid out of the fund so to be brought in by the Plaintiff in this cause.

*Reg. Lib.* 87, fol. 4, 1842.

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MARSHALL v. M'ARAVEY.

Nov. 30. Dec. 2.  
 Bill filed by a mortgagee against the executors and persons claiming under the will of the mortgagor, who had thereby created a trust for the payment of the mortgage debt.

The decree directed that the personal estate of the testator should be first applied in the payment of his debts, and then declared that the Plaintiff should be entitled to the benefit of his mortgage security, in case such personal estate should prove insufficient; and that in case the premises comprised in the mortgage should prove insufficient, the Plaintiff should be considered as a specialty creditor for the residue of his demand, and entitled to the benefit of the trusts of the testator's will.

BY indenture of mortgage, bearing date the 10th of October, 1832, *John M'Auley*, to secure the repayment of sum of 923*l.* lent to him by *John Kelsey*, after reciting several leases for lives and years, to which he was entitled released and assigned the premises comprised therein *John Kelsey*, his heirs, executors, administrators, and assigns, subject to the usual proviso for redemption. The indenture contained a covenant by the mortgagor to repay the money intended to be thereby secured; and, as a collateral security, the mortgagor also executed his bond to the mortgagee, for the penal sum of 1800*l.*, and a warrant of attorney for confessing judgment thereon. Judgment, however, was not entered upon this bond.

*John Kelsey*, the mortgagee, died in 1837, having previously made his will, of which the Plaintiff, *Andrew Marshall*,

*shall*, was sole executor. Under this will, the remaining Plaintiffs in the present suit were beneficially entitled to the mortgage of 1832.

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Statement.

*John M'Auley*, the mortgagor, died in 1840. His will commenced as follows, viz.: "I, *John M'Auley*, of Belfast, &c., declare this to be my last will and testament; after paying all my just debts and funeral expenses, that is to say, whereas I have heretofore executed and passed my bond to one *John Kelsey*, of Drumbridge (since deceased), for the sum of 923*l.* sterling, I hereby direct, and it is my will, that out of whatever property I may die possessed of, the sum of 923*l.* shall be fully paid to the heirs of the said *John Kelsey*, or to whomsoever that is entitled to receive." The testator then proceeded to recite some other debts due by him, and created trusts for their payment. He then devised and bequeathed his property, subject to his debts, to various persons, and appointed the Defendant, *John M'Aravey*, together with *J. S.* and *J. B.*, who renounced probate, his executors.

The present suit was instituted for the purpose of raising the monies secured by the mortgage of 1832. It was apprehended that the value of the mortgaged premises was not adequate to satisfy the debt.

The bill prayed, that an account might be taken of what was due to the Plaintiffs upon foot of the mortgage of 1832, that the amount found due might be paid, and, in default of payment, that the mortgage might be foreclosed; and it further prayed, that an account might be taken of all incumbrances affecting the mortgaged premises, prior to or contemporaneous with the Plaintiffs' mortgage and bond

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 M'ARAVEY.  
 Statement.

(which was also charged, as in said bill mentioned, by the will of *John M'Auley*, the testator), or of such as were specific liens thereon; and also for an account of the personal estate, and of all debts of the said *John M'Auley*; and that his personal estate might be applied in a due course of administration; and that the mortgaged premises might be sold for payment of whatever sum should remain due to the Plaintiff upon foot of the said mortgage, and of such other debts as ought to be paid out of the produce of such sale; and that all persons having such incumbrances should be at liberty to go before the Master, and prove their demands; and the bill further prayed, that in case the monies to arise from such sale should not be sufficient fully to satisfy the demand of the Plaintiffs, upon foot of the said mortgage and bond (so charged, as in bill stated, by the will of the testator upon all his properties), they might then be declared to be entitled to raise such deficiency out of any other property of the testator answerable therefor, and might be permitted to take and have such other proceedings and remedy for such deficiency as the Plaintiffs then had, or might have had, by means of any collateral security.

The bill did not pray that the will of the testator, *John M'Auley*, should be established, or that the trusts thereon generally should be carried into execution.

The Defendants in the cause were *John M'Aravey*, the executor of the mortgagor of *John M'Auley*, and others claiming under him. Orders had been obtained in the cause to take the bill as confessed against all the Defendants, except *Bernard M'Auley* and *Michael M'Auley*, who were minors, and for whom the usual minor's answer was filed.

Mr. Brooke, Mr. Charles Andrews, and Mr. Warren, for the Plaintiffs, asked for a decree according to the prayer of the bill. The general rule is, that a mortgagee is at liberty to avail himself of all his rights and remedies simultaneously. In the case of *Greenwood v. Taylor*(a), indeed, Sir John Leach applied the well known rule in bankruptcy to the administration of the assets of a deceased mortgagor, and held, that a mortgagee must make his mortgage security available in the first instance, and then resort to the common fund for the residue of his debt; but the decision in that case has been much questioned, *Mason v. Bogg*(b), *Brocklehurst v. Jessop*(c). [The LORD CHANCELLOR :— That case does not touch the present. Here the Plaintiffs come in under a trust. The Statute of Fraudulent Devises(d) only operates where an effectual provision has not been made by the testator for the payment of his debts.]

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v.  
M'ABNEY.  
Argument.

In *Pope v. Gwyn*(e), there was a general charge by the will of the mortgagor for the payment of his debts, and a decree was made in the form now prayed for; and Lord Eldon, referring to that case, says, "the decree considers all the real estates, in and out of mortgage, as equitable assets :—" *Seton on Decrees*(f).

Mr. Robert Andrews for a Defendant.

The case stood over, but was not again mentioned, and the decree was ultimately drawn up as follows :

(a) 1 Russ. & M. 185.

(b) 2 Mylne & C. 443.

(c) 7 Sim. 441.

(d) 4 Anne, c. 5; and see *Gott*

v. *Atkinson*, Willes, 521; *Bailey v.*

*Ekins*, 7 Ves. 323.

(e) 8 Ves. 28 (n).

(f) Page 173.

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 Decree.

Refer it to the Master to take an account of what is due to the Plaintiffs for principal and interest upon foot of the mortgage in the pleadings in this cause mentioned, bearing date the 10th of October, 1832, executed by the testator, *John M'Auley* deceased, to *John Kelsey* deceased, for securing the sum of 923*l.*, with interest, at the rate of six pounds per cent. per annum, and of the bond of equal date collateral therewith in the pleadings in this cause also mentioned. Declare that the will of the said *John M'Auley* be established, and let the trusts thereof be carried into execution, and accordingly refer it to the Master to take an account of the debts, funeral and testamentary expenses, and legacies of the said testator *John M'Auley*, and of the annuities created by his will, and let all creditors of the said *John M'Auley* be at liberty to come in and prove their demands in this cause: and declare that the personal estate of said testator, not comprized in the said indenture of mortgage of the 10th of October, 1832, is to be first applied in due course of administration in payment of the debts, funeral and testamentary expenses, legacies, and annuities of the said testator, *John M'Auley*; and in case such personal estate shall not be sufficient for that purpose, declare the Plaintiffs entitled to the benefit of the said mortgage for the payment of their demands in the said cause, or for so much thereof as such personal estate shall be insufficient to pay. Let the residue of the lands and premises comprised in their said mortgage, after satisfying the Plaintiffs' demands for principal, interest, and cost, and the demands of all other incumbrancers thereon, be applicable upon the trusts of the will of the said *John M'Auley*. Let the Master take an account of the lands and premises, estates and interests, comprised in the said mortgage, and of all other the real and freehold estates of s.

testator, *John M<sup>c</sup>Auley*, and into whose hands the same have come, and how disposed of; and of all mortgages, judgments, liens, or incumbrances affecting the same respectively, or any of them, and on what part or parts thereof the same are liens or incumbrances, and their several and respective priorities: and let all parties having such charges and incumbrances be entitled to come in and prove the same; and declare that, in case the monies to arise by sale of the estates comprised in the said mortgage of the 10th of October, 1832, shall not be sufficient to pay what shall be found due to the Plaintiffs in respect of their said mortgage, they are to be considered as creditors by specialty, for the deficiency, and in that character entitled to the benefit of the trusts of said will: and reserve all questions as between the legatees and annuitants and the creditors of the said testator, *John M<sup>c</sup>Auley*, until the return of the report. Let all parties produce before the said Master, or lodge in his office, all deeds, &c. Let the said Master publish such advertisements for creditors and claimants as he shall consider necessary for the purposes aforesaid: and let the parties be at liberty to apply as they may be advised(a).

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v.  
M<sup>c</sup>ABRAVEY.  
Decree.

*Reg. Lib.* 87, fol. 27, 1842.

(a) See *Tipping v. Power*, 2 Hare, 241, (n.); and *Aldridge v. Westbrook*, 5 Beav. 193.  
1 Hare, 405, 409; *King v. Smith*,  
2 Hare, 239; *Greenwood v. Firth*,



1843.

## FERGUSON v. LOMAX.

Jan. 13.

J. F. being resident in Ireland, entered into a contract for the purchase of two annuities from L. and his wife, the Defendants, who were resident in England. The security for the payment of the annuities was a joint and several covenant on the part of the Defendants, and a joint warrant of attorney to confess judgment in the Court of Queen's Bench in Ireland, and a policy of insurance on the life of one of the Defendants at an office in London or Westminster. The only property pledged for the payment of the annuity was an annuity to which the wife was entitled for her separate use, charged upon property situated in Ireland, and which she assigned to the Plaintiff, and

appointed him her attorney, in relation thereto. It appeared that the deeds were prepared in Ireland and on Irish stamps, and sent to England to the Defendants, where they were executed by them, and the consideration money was paid to the Defendants in England, but the deed was executed by the Plaintiff in Ireland:—*Held*, that the transaction was an English one, and the security therefore within the meaning of the Annuity Act, 53 Geo. III. c. 141, and, consequently, void for want of enrolment.

IN this case, which is reported *ante*, vol. ii. p. 120, a case had been sent to the Court of Common Pleas for the opinion of the Judges upon the question, whether the deeds of the 17th of December, 1829, and the 8th of March, 1831, were void, for want of registry under the Statute 53 Geo. III. c. 141.

The following certificate was returned:—"We have heard this case argued by counsel for both parties and have considered it, and we are of opinion that the deeds and instruments of the 17th of December, 1829, and the 8th of March, 1831, are void for want of enrolment under the Act of the 53 Geo. III. c. 141, entitled 'An Act to repeal an Act of the seventeenth year of the reign of his present Majesty, entitled An Act for registering the grants of Life Annuities, and for the better protection of infants against such grants, and to substitute other provisions in lieu thereof.'

"JOHN DOHERTY.

"ROBERT TORRENS.

"NICHOLAS BALL.

"JOSEPH D. JACKSON."

Mr. Moore and Mr. B. C. Lloyd, for the Plaintiff.

Mr. Lane and Mr. Keller for the Defendants.

THE LORD CHANCELLOR expressed his concurrence in view which the Judges had taken of the case, and said as the point was a mere question of law, and the plaintiff was mistaken, he must pay the costs of the suit.

*Reg. Lib.* 87, fol. 40, 1843.

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FERGUSON  
v.  
LOMAX.  
Judgment.

IN ROBERT MALONE, KATHERINE DUIGENAN, MARY ANNE FRAYNE, ROSE FRAYNE, and JANE FRAYNE ;

*Plaintiffs.*

ES GERAGHTY, CHARLES DUIGENAN, ELIZABETH GOGARTY, and JAMES GOGARTY ;

*Defendants.*

An indenture of lease, bearing date the 11th of February, 1823, *Mary Lyster* demised to *Michael Frayne* two fields, situated at Harold's Cross, in the county of Dublin, to hold unto the 25th of March, then last past, for the term of twenty years, at the rent of 56*l.* 9*s.* 4*d.* per annum. The premises demised by this lease were held under the See of Dublin, and the indenture contained the usual *toties quoties* covenant for renewal, on the part of *Mary Lyster*, the lessor. Under this lease *Michael Frayne* entered.

By indenture dated the 8th of February, 1823, and made between *Michael Frayne*, of the first part, *Thomas Fitzsimons*, and *Michael Frayne* the younger, trustees, of the second part, and *John Frayne* and *Katherine Nolan*, of the third part, after reciting the then intended marriage of *John Frayne* and *Katherine Nolan*, the said premises at Harold's Cross were assigned to the trustees, upon trust for *Michael Frayne* for life, and then to permit *John Frayne* to receive annuity of 60*l.* 2*s.* 6*d.*, and after the decease of *John Frayne*, to permit *Katherine Nolan*, and her issue by

Jan. 12, 13.  
Where a lease had been evicted for non-payment of rent, under the Ejectment Statutes in Ireland, and an equitable mortgagee of the tenant's interest filed a bill for redemption against the landlord :—  
*Held*, that he was entitled, under the earliest of those Statutes, the 11 Anne, c. 2, to redeem the premises evicted.  
The general rule is, to make the party seeking a redemption pay the costs of the suit ; but the Court has jurisdiction to throw the costs on the landlord, and the question depends on its own discretion.

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 —  
 Statement.

her then intended husband, to receive the same annuity, share and share alike. This indenture contained covenants on the part of *Michael Frayne*, the settlor, to obtain a renewal for twenty years from *James Geraghty*, the Defendant in the cause (in whom the interest of the lessor in the lease of 1811 had become vested), to preserve the interest in the premises, by paying the renewal fines from time to time during his life, and for further assurance. This settlement was registered.

By indenture bearing date the 10th of December, 1823, *James Geraghty*, in consideration of a renewal fine of 235*l.* granted to *Michael Frayne* a renewal of the premises for the term of twenty years, from the 25th of March, 1823: and this indenture also contained a *toties quoties* covenant for renewal on the part of *James Geraghty*.

*Michael Frayne*, the settlor, died in 1830, having by his will appointed a person of the name of *Doyle* his executor. *Doyle*, however, renounced probate, and thereupon the Defendant, *Elizabeth Gogarty*, one of the daughters of the said *Michael Frayne*, and who had been married to Mr. *James Gogarty*, obtained from the Ecclesiastical Court letters of administration, with the will annexed, to the said *Michael Frayne*.

In 1834, *John Frayne* departed this life, leaving a widow, *Katherine*, and three children, *Mary Anne*, *Robert*, and *Jane Frayne*, issue of their marriage, him surviving -

In the year 1837, *Katherine*, the widow of *John Frayne*, intermarried with a person named *Charles Duigenan*.

A year's rent having become due on the 25th of March, 1838, in Trinity Term in that year, *James Geraghty* brought an ejectment for non-payment of rent, under the Statutes in force in this country, and obtained judgment; and having executed a writ of *habere facias possessionem*, he was put into possession of the premises. Under these circumstances, *Katherine Duigenan* and *Michael Frayne*, the younger, one of the trustees of the settlement of 1823 (and who appeared to have had the management of the premises), applied to a person named *John Robert Malone*, to advance money for the purpose of redeeming the lands, promising to put him into possession, until he should have repaid himself the amount of his advances, and to grant him a mortgage of the premises. To this proposition, *John Robert Malone* assented, and accordingly paid to *James Geraghty* 85*l.* 1*s.* 6*d.*, the sum due for rent and costs, and obtained from him a receipt in these terms, viz.:

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“ Lessee *Geraghty v. Duigenan and Wife.*

“ Received from Mr. *Malone*, 85*l.* 1*s.* 6*d.*, in redemption of the premises ejected in the above cause, being the rent, inclusive of March last, and costs, and will give on Monday a stamped receipt.

“ JAMES GERAGHTY.”

Immediately before this payment was made, *Michael Frayne*, the trustee, with the approbation of *Katherine Duigenan*, deposited with *John Robert Malone* the title deeds of the premises, by way of equitable mortgage, to secure this sum of 85*l.* 1*s.* 6*d.*; and this deposit was accompanied by a memorandum in writing, which stated the purpose of the deposit: but no deed of mortgage was ever executed to *John R. Malone*.

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*Michael Frayne* the younger, then entered into possession, but he neither paid *John R. Malone's* advance, nor *Katherine Duigenan's* annuity; and having suffered the rent again to fall into arrear, *Geraghty* a second time brought an ejectment, in which he obtained judgment (the declaration having been served on *John R. Malone*), and on the 22nd of May, 1840, took possession under a writ of *habere*, and on the 24th of the same month wrote the following letter to *John R. Malone*:

“DEAR SIR,—Having got possession of *Frayne's* land on the Kimmage Road, on Friday last, it is absolutely necessary for me at once to determine what shall be the state of the land for the ensuing six months. The former tenant, *M'Donnell*, has applied to me to let him have it for the redemptionary period. Be so good as to let me know your intentions.

“I am your's very truly,

“JAMES GERAGHTY.

“Sunday, 24th May.”

On the 22nd of October, 1840, *John R. Malone*, on behalf of himself and the other parties interested in the premises, made a tender to *James Geraghty* of 120*l.*, in satisfaction of the arrears of rent and the costs of the ejectment. This tender was refused. Several interviews took place between *Malone* and *Geraghty*, and *Malone* and a Mr. *Armstrong*, *Geraghty's* solicitor: and on one occasion, *Armstrong* said that he would accept the amount of rent and costs, if he *Malone* would produce any authority from *Katherine Duigenan* to make the tender; but afterwards, upon *Katherine Duigenan* giving the authority, he refused to accept the tender without an application from her husband, *Charles Duigenan*.

Under these circumstances, the present suit was instituted for the redemption of the premises. *John Robert Malone, Katherine Duigenan*, and her issue by *John Frayne*, were co-Plaintiffs. *James Geraghty*, with *Charles Duigenan, James Gogarty*, and *Elizabeth Gogarty* his wife, the personal representative of *Michael Frayne*, the elder, were made parties Defendants.

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The bill stated the foregoing facts; it also charged, that the annuity of 60*l.* 2*s.* 6*d.* nearly exhausted the rents and profits of the premises; that the memorandum which accompanied the deposit of the deeds with *John R. Malone* specified the object and purpose for which said deposit was so made; that *James Gogarty* was out of the jurisdiction; and that *Elizabeth Gogarty* and *Charles Duigenan* had refused to join in the suit as co-Plaintiffs.

The bill prayed, that the Plaintiffs might be declared entitled to a redemption of the premises, upon payment of the sum due for arrears of rent and costs; and that an injunction might issue, to put the Plaintiffs, or some or one of them, or *Elizabeth Gogarty*, into possession; and for an account of the rents and profits received by *James Geraghty* since the eviction, or which, without wilful default, he might have received.

The sum of 120*l.* had been lodged in Court, to the credit of this cause.

The Defendant, *James Geraghty*, by his answer, stated, that the Plaintiff, *John R. Malone*, never informed him that he had obtained any mortgage, either legal or equitable, from any person interested in the premises; that he

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believed *Malone* had advanced the money to *Michael Frayne* upon his personal credit, and that *Malone* had not had the concurrence of *Katherine Duigenan*, or her husband, in advancing the money; that after the second ejectment, the tender mentioned in the bill had been made, but, as Defendant believed, on the part of *Malone* himself only. He admitted that the tender was sufficient in amount, and said he refused to accept it, because he thought *John R. Malone* had not any right to interfere and introduce himself as tenant, merely on account of his having had a personal dealing with *Michael Frayne*; that the assent of *Katherine Duigenan* was obtained merely to give colour to *Malone's* interference, and that her husband had refused to interfere; that he had offered a redemption to *Charles Duigenan*, and to accept the arrears of rent from him, provided he would undertake the management of the premises, and be accountable for the rent, but that this offer had been declined.

The Defendant, *James Geraghty*, also objected, that the trustees of the settlement of 1823 were the proper persons to apply for redemption, and were necessary parties to the present suit.

*Argument.* Mr. J. J. Murphy, Mr. Whiteside, and Mr. John D. Fitzgerald, for the Plaintiffs.

The Attorney-General, Mr. Pigot, and Mr. Edward Geraghty, for the Defendant Geraghty.

No person entitled to call for a redemption is a party on this record. *Malone*, as equitable mortgagee, is not responsible for the rent or other covenants in the lease, as he never was in possession of the premises, *Moore v. Choat* (a).

(a) 8 Sim. 508. See also *Robinson v. Rasher*, 1 Younge & C., C. C. 9; and *Sanders v. Benson*, 4 Beav. 350.

Under the Ejectment Statutes, it is true, under-lessees and mortgagees may redeem, but the Statutes evidently extend only to legal mortgages, for they contemplate the registry of the instrument under which the party seeking a redemption claims<sup>(a)</sup>, and an equitable mortgage cannot be registered. Supposing that *Malone* has a right to redeem the premises, he never shewed his title to the Defendant, or apprised him in any way that he was, or claimed as, equitable mortgagee of the premises. The legal interest is in *Frayne* the trustee; he is not a party to this suit, nor does it appear that any communication upon the subject of the redemption of the premises ever took place between him and the Defendant *Geraghty*.

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In any event of the case itself, the costs, according to the settled practice, must be paid by the Plaintiffs.

Mr. J. J. Murphy, in reply.

The first of the Ejectment Statutes<sup>(b)</sup> clearly applies to the case of an equitable mortgagee; the words are, "claiming any right, title, or interest, in law or equity, of, in, or to the lease." The subsequent Statutes do not curtail or take away rights conferred by the first Act. It is a mistake to suppose that the legal estate is in *Frayne*; his legal estate expired in 1831; he has now no estate. All the legal estate at present existing is derived under the renewal of 1823, and is vested in the personal representative of *Michael Frayne*, the elder, who is before the Court. How can the Defendant's letter of the 24th of May, 1840, be explained, if he was not aware that *Malone* had some title to redeem?

<sup>(a)</sup> 8 Geo. I. c. 2, s. 5.

<sup>(b)</sup> 11 Anne, c. 2, s. 4.



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The suit has been entirely occasioned by the Defendant's default ; the costs, therefore, should fall upon him.

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Jan. 12.  
Judgment.

THE LORD CHANCELLOR :—

The question in this case resolves itself into one of costs, for it cannot be seriously contended that there is no right of redemption, or that the Plaintiff *Malone* is not entitled to redeem in his character of an equitable mortgagee. The case of *Moore v. Choat*, which was referred to, and which decided that an equitable mortgagee is not bound by the covenants in the lease, unless he enters into possession, does not touch the present case, for here the demand, which *Malone* makes, is a demand of that, which would entitle him to possession ; and the moment a man gets into possession under a lease, even according to this authority, he becomes liable to the rent, and is bound by the covenants contained in the lease.

The Statute of Anne<sup>(a)</sup> was passed over without much observation, in relation to this question ; however, its language appears to me perfectly clear. [His Lordship here read the clause of the Statute]. Can any thing be more distinct or comprehensive ? How can it be said in a Court of Equity, that he who has an equitable mortgage, and is entitled at any moment to file a bill, and clothe himself with the legal estate, has not such a right under this enactment, as enables him to sustain the present bill ? In this Court he is considered to have the estate to which he is entitled ; and I can entertain no doubt of his right to redeem. It is not necessary to consider particularly the

(a) 11 Anne, c. 2.

Statute of George(a), because its effect is merely to enlarge the terms of the previous Statute ; and, in my opinion, under the Statute of Anne, the position admits of no doubt, that an equitable mortgagee can file a bill for redemption. Every necessary preliminary has been complied with. 'The Act of Parliament does not require any particular act to be done by the party seeking to redeem, except only the payment of the money ; it does not say that any deeds must be executed ; if the amount of the debt and costs are paid, redemption follows. Redemption unsettles nothing, disturbs nothing ; it simply restores every thing. When, therefore, in the present case, the Defendant called upon *Malone* to execute a deed, declaring that he was about to redeem the lands, upon the trusts of the marriage settlement of 1823, he called upon him to perform an act, neither contemplated nor required by the Statute, and one which was wholly unnecessary. The rights, which existed antecedent to redemption, would have prevailed afterwards, just as if no eviction had taken place. There was no doubt as to the Plaintiff *Malone* being a mortgagee, and that as such, on a former occasion, he paid his money to save these premises from being lost. And further, there is no doubt but that Mr. *Geraghty* knew that *Malone* was such mortgagee ; for when *Malone*, on the former occasion, when these premises were under ejectment, paid *Geraghty*, a receipt sufficient for the redemption of this very property was given. I must consider *Geraghty* as then dealing with the Plaintiff, as filling that character, which alone gave him a right to interfere, and I now fix him with the knowledge thus acquired. Then, again, there is the letter of the 24th

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(a) 8 Geo. I. c. 2 ; 4 Geo. I. c. 5.

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of May, written by Mr. *Geraghty* to *Malone*, after the ejectment, out of which the present suit has arisen, requiring information as to the intentions of the latter with respect to this property. Why should he have written this letter, if he did not know that *Malone* was a mortgagee, and as such represented the estate, and was in fact the person entitled to redeem. I cannot entertain any doubt as to the facts of this case.

Then it is said there is a want of parties ; that *Michael Frayne*, the trustee in the settlement of 1823, under which the rights of the co-Plaintiffs, *Catherine Duigenan* and her children, arise, is not before the Court. The objection, however, was not pressed, and the reason is obvious, for although *Michael Frayne* the younger was a trustee under that settlement, still the legal estate was vested in *Michael Frayne* the elder, and his personal representative is before the Court, a party Defendant upon this record. Every thing, therefore, appears to be regular as to parties, and the redemption is, in my opinion, quite of course.

As to the costs of the suit, they depend upon the discretion of the Court. In cases of this nature, however, they generally fall on the party seeking redemption ; but in this case, a different rule must prevail, for it was the conduct of the Defendant, Mr. *Geraghty*, that rendered this suit necessary. It is said that Mr. *Geraghty* was only endeavouring to protect the interests of this lady and her children and also that certain acts of waste had been committed deteriorating the value of the property, the recurrence of which he was anxious to prevent. The latter allegation has not been attempted to be proved ; and as to the former

his precautions were needless ; the Defendant made demands, and called upon *Malone* to do certain acts, which were unnecessary, and which he had no right to require from him. There is nothing whatever in the case to impeach the conduct of *Malone* ; on the other hand, Mr. *Geraghty's* conduct has rendered the suit necessary, and he must consequently pay the costs.

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I have refrained from making any observations upon a circumstance, which would aggravate the case very much against the Defendant. I allude to the deposition of *Campion*, who states a conversation which took place between *Malone* and *Geraghty*, in which *Geraghty* said, that if *Malone* would not interfere, he would refund the money, which *Malone* had paid on the occasion of the former ejection. This is not very distinctly denied by the answer, and certainly the conversation referred to may admit of some explanation. *Geraghty* may have meant that *Malone* should not lose, in consequence of the premises not being redeemed, and may not have intended to induce him to abstain from redeeming them. I say this with the view of removing any impression which might possibly have arisen, unfavourable to the Defendant's conduct ; but on the other hand, I do not mean to cast any imputation upon the witness *Campion*.

The *Attorney-General*, on the part of the Defendant, Mr. *Geraghty*, submitted that the Court had not jurisdiction to throw the costs of the suit upon the landlord, and stated that the invariable practice had been, never to give costs against the landlord.

Mr. *Murphy*, for the Plaintiffs, said that the Court of

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Exchequer, in some late cases(a), had given the costs of redemption suits against the landlord.

THE LORD CHANCELLOR :—

I think I have jurisdiction to throw the costs of the suit on the Defendant, where, as in the present case, the necessity of the suit results from his conduct ; but if the counsel for the Defendant think they can sustain the contrary opinion, I will allow the point to be argued to-morrow morning.

This offer was not accepted.

(a) *Kent v. Roberts*, 3 Ir. Eq. R. 279; *Newenham v. Mahon*, *ibid.* 304; and see the judgment of Mr. Baron Lefroy, in *Reade v. Montmorency*, 5 Ir. Eq. R. 50.

Feb. 8.

A decree must be made up before the cause can be re-heard, and if a petition of re-hearing is presented while the decree remains in minutes, it will be dismissed with costs.

On this day, the cause came on to be re-heard, upon the petition of the Defendant, *James Geraghty*.

This Court

has an original jurisdiction for the relief of tenants, whose leases have been evicted for non-payment of rent; and this ancient jurisdiction has not been destroyed, but merely restricted by the Irish Ejectment Statutes, which operate as a Statute of Limitations, and oblige a tenant, if he thinks fit to have recourse to a Court of Equity, to do so within the particular times specified in those Statutes.

The words of the fourth section of the 11 Anne, c. 2, cannot be limited to mean assignees at law, but must be held to include every interest under the lessee.

*Semble*.—Where a bill for redemption is filed within the time prescribed by the Statute by the parties who are entitled to redeem, the Court has jurisdiction to allow the cause stand over, in order that formal parties may be added.

The petition complained as follows, viz.: That by the decree pronounced on the 13th of January the petitioner conceived himself aggrieved, inasmuch as it was there decreed that the Plaintiff, *J. R. Malone*, claiming as equitable mortgagee in the manner in the bill stated, by virtue

of his alleged dealings with *Michael Frayne*, had a right to a redemption of the premises in the bill mentioned, from this Defendant, as immediate landlord, and in the possession of said premises by virtue of an ejectment and proceedings at law grounded on the several Statutes in force in Ireland for the more effectual preventing of frauds committed by tenants, the petitioner humbly insisting that said *J. R. Malone* was not a legal mortgagee of said premises, nor within the description of persons authorized by said Statutes to maintain a bill for redemption ; that in this country there was no precedent for such a bill ; that the petitioner was advised that the Court was led to pronounce the said decree by the supposed application of the provisions of the 11 Anne, c. 2, to the said *J. R. Malone*, as an assignee or person deriving under the lessee, whereas that provision had always been applied to persons claiming legal interests, and that the provision itself had been subsequently modified by the 8 Geo. I. c. 2 ; and that since the passing of that Statute, its provisions had been held in all the courts of justice in Ireland to provide the rule as to the persons to be served with the declaration in the ejectment, and to be entitled to redeem after eviction by the landlord. That the several Statutes constitute one code of laws<sup>(a)</sup> upon the subject of the recovery of rents ; and that by the special provisions of the said code the petitioner, as landlord, was entitled to his costs upon redemption ; and that the circumstances of the case were not such as should deprive him of that right.

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This petition was only signed by one of the counsel who had argued the case on the former hearing.

(a) Sec 5 Ir. L. R. 293, 307.

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*Argument.*

Mr. *J. J. Murphy* and Mr. *J. D. Fitzgerald*, for the Plaintiffs.

This petition is irregular. One of the General Orders of this Court requires every petition of re-hearing to be signed by two of the counsel in the cause.

[THE LORD CHANCELLOR :—I will not dismiss this petition upon that ground, unless some authority is produced to shew that the order is not obsolete. It seems to me to be an unreasonable rule : the orders of 1834 are the General Rules of this Court].

Mr. *Murphy* :—There is another preliminary objection to this re-hearing : the decree of the 13th of January has not been made up, it still remains in minutes.

[THE LORD CHANCELLOR :—This objection is conclusive. There is no decree upon which to re-hear the cause. I have already decided, since I sat here, that there cannot be a re-hearing upon minutes(a). This petition must be dismissed, with costs. However, if the Plaintiffs consent I will allow the case to proceed, as if upon an argument to settle the minutes. It must, however, be understood, that whatever may be the result of this argument, the costs are to be paid by the petitioners].

Mr. *Murphy* having consented on the part of the Plaintiffs, the argument then proceeded.

The first objection raised against the decree, in the petition of rehearing, is, that the Plaintiff, *Malone*, is not

(a) *Commissioners of Charitable Donations v. Hunter*, 1 D. & W. 544.

legal mortgagee, and that mere equitable mortgagees are not entitled to redeem. This objection cannot be sustained: the second section of the 11 Anne, c. 2, is not confined to legal estates, and, by express words, the right of filing a bill to redeem is given by the fourth section to persons claiming equitable, as well as to those claiming legal, interests. It is not necessary for the Plaintiff to rest his case upon, or bring it within the enactments of the Statute 8 Geo. I. c. 2, for the present bill was filed within the period prescribed by the Statute 11 Anne c. 2. The terms of the first Act are extremely general, much more so than those of the 19 & 20 Geo. III. c. 30 (the Irish Tenantry Act), which only uses the words "tenants and their assignees;" yet, in the case of *Smith v. Shannon*(a), in this Court, it was held that a judgment creditor of a person entitled to an estate *pur autre vie*, renewable for ever, could sustain a bill for the renewal of the lease under that statute; and it is to be remembered that that case was decided before the 3 & 4 Victoria, c. 105, came into operation, and when the creditor by judgment had not any specific lien upon the land. The Statute 8 Geo. I. c. 2, does not interfere with any right of redemption conferred by the previous Statute. In *Berney v. Moore*(b), it was held, that an undertenant was entitled, within six months after the execution of the *habere*, to redeem, upon filing a bill and depositing in Court the arrears of rent and costs, and that the effect of this redemption would be to wipe up all the interests, which had been created under the lease. In *Sheridan v. Dawson*(c), it was held by the Court of Exchequer that the effect of redemption was to

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(a) 3 Ir. Eq. Rep. 452.

(c) 1 Jones, 256.

(b) 2 Ridg. P. C. 310, 321.



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restore the lease in *statu quo ante*, as if there had not been any eviction; so that the tenant could maintain an action of trespass for acts done intermediately between the execution of the *habere*, and the decree for redemption. These cases shew that after redemption all things are restored, and the landlord's rights, and his remedies for the recovery of future arrears of rent, are undisturbed: the stipulation, therefore, of a covenant from *Malone* to pay the rent was unjustifiable. The second ground of complaint is, that costs were given to the Plaintiffs. It is not correct to say, that the costs of the suit for redemption are thrown by the Statutes upon the tenant; the legislature merely imposes upon the tenant, as a condition precedent to the redemption, that such costs as have been incurred prior to payment or tender of the arrears of rent, shall be paid or tendered with those arrears. All subsequent costs must be adjudicated upon according to the discretion of the Court, and that discretion has been frequently exercised in favour of the tenant and against the landlord; *Newenham v. Mahon*(a). In *Reade v. De Montmorency*(b), the existence of this discretion is alleged: there Chief Baron *Brady*, after observing that the general rule was to give the landlord his costs, says, "the contrary is an exception to the rules, and one which I am not afraid to adopt in any case calling for it; for it would be monstrous to hold that the landlord might, in all events, rely on his legal possession; and, no matter how illegal or false or untenable his defence and possession, he should nevertheless be entitled to the costs of the suit." Here the defence is illegal and untenable. The landlord's default has occasioned all the litigation. A tender, which it is admitted was sufficient in amount, was made, but an

(a) 3 Ir. Eq. R. 304.

(b) 5 Ir. Eq. R. 40, 48.

evasive answer was first given, and then a refusal. The Defendant has, moreover, also endeavoured to clog the right to redemption with conditions, which he had no right to impose. *Flight v. Bentley(a)*, and *O'Reilly v. Fetherstone(b)* were also referred to on the part of the Plaintiffs.

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Mr. Geraghty, Mr. Dwyer, and Mr. Edward Geraghty, for the Defendant, the petitioner.

The decree in this case is open to numerous objections. In the first place, there has been a misjoinder of Plaintiffs; for, assuming that *Malone*, in his character of equitable mortgagee, was entitled to file a bill for redemption, he has improperly joined with him, as co-Plaintiffs, the persons entitled to the lease, subject to his mortgage.

Again, the bill is defective for want of parties; the surviving trustee of the settlement of 1823 is not a party upon the record: now, by that settlement, the whole legal estate was transferred to the trustees, and they executed the deed: and this defect cannot be now supplied, for the Plaintiffs were bound under the Statutes to file a perfect bill, within the prescribed time.

The Plaintiffs' alleged title has not been sustained by the evidence. The memorandum, which it is said accompanied the deposit of the title deeds with *Malone*, was attested by a subscribing witness, and that witness has not been examined, but the document is attempted to be proved by a third person. The memorandum itself is not properly put in issue by the bill; the mere statement, that it specified the purpose of the deposit, is vague. It is true, the

(a) 7 Sim. 149.

(b) 2 Dow & C. 39; 4 Bligh, 161.

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Defendant had information of a deposit of deeds, and of an advance of money ; but these alone do not necessarily make the transaction an equitable mortgage. In *Norris v. Wilkinson(a)*, deeds were delivered for the purpose of having a legal mortgage prepared, and it was held that this delivery did not amount to an equitable mortgage. With respect to Mr. *Geraghty's* letter of the 24th of May, 1840, it was written merely because the Defendant thought it fair to do so, as he was aware of the advance of 85*l.* having been made by *Malone*. *Elizabeth Gogarty* ought to have been Plaintiff. There is no evidence that she refused to join as such. *Katherine Duigenan* and her children are only annuitants ; the lease and surplus rents are the property of *Elizabeth Gogarty*. How is *Katherine Duigenan* to be put into possession ?

The principal objection is, however, this, that the Ejectment Statutes do not confer on a mortgagee, by deposit of title deeds, any right to file a bill for the redemption of an evicted lease. The Statutes confer no such right there is no precedent for such a bill, and general principles are opposed to such a proceeding. There is neither privity of contract nor of estate between *Malone* and the landlord. In England, by reason of such a deposit, no person could file a bill in equity, *Moore v. Choat(b)*, *Fligh v. Bentley(c)*. The Plaintiffs' case depends entirely on the Statute, 11 Anne, c. 2. Now, there is no pretence for saying that the second section is sufficient in its terms to embrace this case ; it only gives the right of redemption to the lessee or his assignee, or some person claiming or deriving under the lease. A *cestui que trust* would not come

(a) 12 Ves. 192.

(b) 8 Sim. 508.

(c) 7 Sim. 149.

thin these terms. But the fourth section has been chiefly  
 ied upon ; it may be admitted, that *prima facie* the  
 rds "claiming any interest at law or in equity," which  
 cur at the commencement of that section, would embrace  
 e case of an equitable mortgagee ; but this was not the  
 tion of the Legislature, and these words must be  
 ntrolled by the general tenor of the Statute. In the  
 besquent part of the same section, in reference to the  
 itoration of possession, the only words used are "lessee"  
 d "assignee." In *M'Ineherney v. Galway(a)*, it was held  
 Mr. Baron *Pennefather*, that this section only applied to  
 lls filed before the execution of the *habere*. The Court  
 s, perhaps, jurisdiction to relieve from the consequences  
 an act of God, as in the case of *Ryan v. —(b)*, where  
 iolent snow storm made the roads impassable, and the  
 ant, being consequently unable to lodge the redemption  
 ney in Dublin, within the prescribed period, deposited it  
 th Chief Baron *O'Grady*, who happened at the time to  
 in the country, in the immediate neighbourhood of the  
 ant, and relief was given ; but that case was an excep-  
 m to the general rule ; and here has been no impossibility  
 act of God, which could be pleaded in excuse. In the  
 Geo. I. c. 2, persons entitled as mortgagees of the lease  
 : expressly provided for ; and that Statute clearly does  
 : extend to equitable mortgagees. The intention of the  
 gislature was, that the right of redemption should be  
 : extensive with the estate in the lease, and the privity of  
 : contract between the landlord and his tenant. The  
 ion of the Profession in this country has hitherto been,  
 at the right of redemption could not be carried to the  
 tent necessary to sustain the present bill.

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(a) Jones & C. 247.

(b) 1 Jones, 146.

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The last point in which the decree is considered objectionable is, that it has thrown the costs of the suit on the landlord. The practice of the Courts in this country has always been, to give the landlord his costs, whatever might be the result in other respects, *Biddulph v. St. John*(a) *Wilde v. Manly*(b), *Bodkin v. Vesey*(c). In *Fitzgerald Hussey*(d), the decree was without costs, though the landlord refused a tender of the rent and costs within the six months. *Kent v. Roberts*(e) was a case of fraud, and yet costs were not given against the landlord. *Newenham v. Mahon*(f) is the only case, in which any costs were given against the landlord; and there, although his conduct had been most litigious, he was allowed the costs of the bill. In this case, the default of the tenant, in not paying his rent, was the primary cause of all the litigation which ensued. The Defendant cannot be charged with improperly litigious conduct in resisting the demand for redemption, for he had not any means of learning the right of *Malone, valeat quantum*, until the hearing of the cause. In *Kenmare v. Supple*(g), Lord Chancellor *Lifford* says, "The Court will make compensation to the landlord for his trouble and the delay he has sustained."

Mr. John D. Fitzgerald, in reply.

The objections, that there has been a misjoinder, and a defect of parties, are not raised by the petition of re-hearing. All the facts—the receipt, the ejectment proceedings, the letter on the Defendant's taking possession of the premises—the offer to refund the 85*l.*, concur with the parol eviden-

(a) 2 Sch. & L. 521.

(b) 2 Molloy, 413.

(c) 1 Jones, 139.

(d) 3 Ir. Eq. R. 319.

(e) 3 Ir. Eq. R. 279.

(f) Ib. 304.

(g) Vern. & S. 1, 13.

to shew that the Defendant must have had knowledge of the nature of *Malone's* title. It is now too late to urge an objection to the admissibility of the memorandum of deposit, which was read without objection at the former hearing, and is not mentioned in the petition. The Defendant's arguments amount to a general denial of the right of redemption by persons having equitable interests. The Court will not assent to such a proposition, unless coerced to do so by the authority of Acts of Parliament, or judicial decisions. Now the Statutes only restrict the pre-existing equity of the tenant, and those deriving under him, in point of time. There is no case in which that pre-existing right has been denied, nor any, in which the Statutes have been held to take away the right of redemption altogether from those who prior to the Statutes enjoyed, or were entitled to, the privilege. The enactments of the Statutes, the practice of the Courts, the principles on which the cases have been decided, and the opinion of the Profession, are all consistent with this doctrine. With respect to costs, the Statutes do not control the usual discretion of the Court. Generally, inasmuch as the first default is in the tenant, the landlord gets costs; but the cases shew, that on fit occasions the Court will exercise its discretion, and, according to circumstances, give no costs, or give the costs against the landlord, or give part of the costs to the tenant, and part to the landlord.

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MALONE

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*Argument.*

*O'Reilly v. Fetherstone(a), Berney v. Moore(b), and Butler v. Blake(c)*, were referred to.

(a) 2 Dow &amp; C. 39; 4 Bligh, 161.

(b) 2 Ridg. P. C. 310.

(c) 1 Drury &amp; Walsh, 380.

1843.  
MALONE  
v.  
GERAGHTY.  
Feb. 9.  
Judgment.

THE LORD CHANCELLOR :—

This case has assumed a very important aspect, and am not sorry that it has been re-heard. I will not dispose of it until the first day of next Term, and in the mean time will direct precedents to be searched for.

Many questions have been raised, which, however, not involve much difficulty, independently of the serious question of law, which so materially affects property in the country, and which, if decided according to the argument at the bar, on the part of the Defendant, would very much restrict the rights of tenants in Ireland.

Before I discuss these questions, I am desirous that the form in which the case comes before the Court should be distinctly understood. A petition of re-hearing having been presented, when the cause came on, it turned out that the decree still rested in minutes. I have already had occasion to consider this point<sup>(a)</sup>, and it was a matter of course that the petition should be dismissed with costs. With the consent of the Plaintiffs, however, in order to save expense the cause was heard, as if it was a discussion upon the minutes. I make this explanation, as I must take care not to break in upon the established rule of the Court, that a cause cannot be re-heard upon minutes.

The first objection was, that there was a misjoinder of Plaintiffs. The second, that there was a defect of parties. The third, that a material document had not been properly proved : and the fourth, that the Plaintiffs' case had been

(a) *Commissioners of Charitable Donations v. Hunter*, 1 D. & Wren, 544.

stated in such a manner, as to preclude the Court from granting the relief prayed. I must postpone the consideration of the two last points, until I have considered the principal question.

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MALONE  
v.  
GERAGHTY.  
—  
Judgment.

As to the first objection, I am clearly of opinion that there has not been any misjoinder. *Malone* was an equitable mortgagee, and the equitable mortgagee may concur with the party entitled to the equity of redemption in such a suit as the present. As to the second, the want of parties, it is necessary to see how the title stands. Mr. *Geraghty* being possessed of the lands, under a lease from the See of Dublin, granted an under-lease to *Michael Frayne* the elder, for the term of twenty years, with the usual *toties quoties* covenant for renewal, reserving a considerable renewal fine. *Frayne* settled this under-lease on the occasion of the marriage of *John Frayne*, assigning it to trustees, who took the legal estate, for the lease being a chattel interest, the Statute of Uses could not have any operation. *Frayne* the elder covenanted that he would renew, and he accordingly did obtain a renewal, but in his own name, and consequently acquired the whole legal estate, subject only to the residue of the term vested in the trustees. *Frayne* the elder has since died, and his personal representative, who is before the Court, has the legal estate, and would be entitled beneficially to any surplus beyond the interest of the widow and children. The bill is filed by the widow and children of *John Frayne*, and they are entitled to an annuity, which, it is agreed, exhausts the whole beneficial interest. There is, therefore, in fact no beneficial interest not vested in the co-Plaintiffs, and the personal representative of *Michael Frayne* represents the residue of the legal estate. It is said that the trustees are



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 MALONE  
 v.  
 GERAGHTY.  
 Judgment.

not parties ; but the trustees have now no legal estate. I am not, however, called upon to decide the question, as the necessity of making these trustees parties, for the objection is not raised by the petition of re-hearing. The case was very well argued on the former occasion (although since, of course, looked into more minutely, and more elaborately discussed), and I perfectly remember that objection for want of parties was then made, but afterwards abandoned, and wisely, as I then remarked : with a technical objection such as this, not in the least affecting the merits of the case, has been deliberately waived. Counsel at the bar, I cannot allow it to be argued against. But still further, the petition of re-hearing, which raises a question of law, is silent on this point : and, indeed, if the objection were to prevail, the only result would be, to make the cause stand over, with liberty to amend ; for I am clearly of opinion, that if a bill for redemption is filed within the time prescribed by the Statute, by the parties who are entitled to redeem, I have jurisdiction to allow the cause to stand over, in order that formal parties may be added

I now come to consider the real question in the case. It has been argued on the part of the Defendant, with great confidence, and counsel have relied upon their knowledge of the practice of the Courts in this country, the result of long experience, to which I am disposed to pay great attention. On the other side the practice is, with equal confidence, stated to be in favour of the Plaintiff's view. The question is, whether a person who has a mere equitable interest can maintain a suit under the Statutes, for the redemption of an evicted lease ? The present case is well calculated to try the rule, for the person who has the legal estate is before the Court as a Defendant upon the record.

It was said at the bar, that if this case was now being heard in Westminster Hall (that is, the Court of Chancery in England), no counsel could be found to argue the propositions necessary to sustain the Plaintiff's case; and the doctrine was carried as high as this, that if a lease was granted to *A.*, in trust for *B.*, and the lessor having recovered for non-payment of rent, *A.* declined to redeem, *B.* would be without a remedy, because it was impossible to hold, that any one not in privity with the landlord could compel a redemption. This was laid down as a general proposition. I apprehend, however, that the law is the other way; the whole jurisdiction of this Court depends upon different principles. This Court looks upon the equitable right, as if it were the estate; and if the person, who has the legal title, thinks proper to desert his duty, and abandon the party whom it was his business to protect, this Court will not only compel him to perform his duty, but in the meantime will give to the *cestui que trust* all the benefit he would have regularly obtained, if his trustee had acted properly. I am now speaking of the general principle, independently altogether of the Statute. In the common case of a lease *pur auter vie*, renewable upon the usual terms, if the *cestui que vie* has died, and the trustee refuses to take proceedings to enforce a renewal, and time is about to elapse, so that there is no time for filing a bill to compel the trustee to act, the *cestui que trust* may himself file a bill for a renewal, stating the misconduct of the trustee, and making the latter a party to the suit. However, it certainly was not necessary to go so far as the argument to which I have referred, in order to maintain the landlord's case.

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Judgment.

But it is said, that as there is no legal right, there is no equity, independently of or beyond the Statute, and that such

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*Judgment.*

has been the doctrine held by all the Courts in this country. I have always taken care not to interfere with the strict construction of those laws which are peculiar to Ireland. Before the passing of any of the Statutes, which now form the code, by which proceedings in ejectment in this country for non-payment of rent are regulated, it is manifest that there was an equity, depending upon general principles. This is distinctly referred to in the earliest of those Statutes<sup>(a)</sup>; it is recited as one of the evils complained of that bills were filed in Courts of Equity, whereby landlords were prevented from recovering possession. The first enactment upon the subject was the Statute 11 Anne c. 2, by which it was proposed to remedy a great evil. It gives the landlord power to evict his tenant, if the tenant falls more than half a year into arrear, and there is no sufficient distress, but with this condition, that the said eviction shall only defeat the lease, in case "the lessee or lessee's heirs or their assignee or assignees, or other person or persons claiming or deriving under the said leases, shall pay and suffer judgment to be had and recovered on such execution and execution to be executed thereon, without paying the rent and arrear, together with full costs, and without filing any bill or bills for relief in equity within six calendar months after such execution executed." It is argued that this condition applies only to the case of legal tenants, but what is the language of the fourth section, "in the said lessee or lessees, his or their assignee or assignees or other person or persons claiming any right, title, or interest in law or equity, shall, &c." How are these words to be explained away? In the case of *M<sup>r</sup> Inchern Galway*<sup>(b)</sup>, Mr. Baron Pennefather is reported to have:

<sup>(a)</sup> 11 Anne, c. 2.<sup>(b)</sup> Jones & C. 247.

that this fourth section "only applied to applications made to the Court before the execution of the *habere*." But that does not affect the question which I am now considering, namely, was the old jurisdiction of this Court annihilated? Was it taken away altogether, or merely restricted? Now it is clear that it was not destroyed, but simply restricted. The Statute operated as a new Statute of Limitations, by which this Court was unquestionably bound; and the tenant was thereby obliged, if he thought fit to have recourse to a Court of Equity, to do so within a particular time specified in the Statute; and in *Berney v. Moore*(a), the law is stated exactly as I have now laid it down, by Mr. Justice *Crookshank*, a Judge who no doubt well understood the law of Ireland. Now if this be so, whoever could have filed a bill for redemption, before the Statute of Anne, can do so now, unless the right is taken away by the Statute. But such was evidently not the intention of the Act, and the words are general; they are, "lessee or lessees, his or their assignee or assignees, or other person or persons claiming or deriving under the said leases." In the case(b) in the House of Lords, the Judges were in effect asked what was the meaning of the latter words. It would seem that they must mean the persons, who, although claiming an interest, are not properly assignees in law. But what was the opinion of the Judges? Seven Judges were asked, if an under-lessee of part of the premises comprised in an ejectment, brought by the first lessor for non-payment of rent, were to file a bill in a Court of Equity against such lessor, within six months after such execution, depositing also in Court, within the said time, the whole

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Judgment.

(a) 2 Ridg. P. C. 310.

(b) *Berney v. Moore*, 2 Ridg. P. C. 310.

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arrear of rent, together with full costs, would such under-tenant be barred and foreclosed from all relief or remedy in law and equity? and six Judges out of the seven answered this question in the negative, being of opinion that an under-tenant was not barred either at law or in equity. Now an under-tenant is different from an assignee; it is proved, therefore, that "persons claiming or deriving under said lease" means persons claiming otherwise than as assignees in law; and they ought to be held to include every interest under the lessee: and in the fourth section, the Legislature uses words manifestly of the same import although more express, "persons claiming any right, title or interest in law or equity." It does not matter whether the bill is filed before or after the execution of the *habere* but the question is, whether in dealing with the existing equity, the Legislature intended to take away the relief which the tenant was previously entitled to. The Statute speaks not as if it gave a right to file the bill; the enactment is merely negative. It says the right of the party to file the bill shall be barred, unless he proceeds within a certain time; but it leaves the general right, as it stood before the Statute. In that point of view, therefore, it would follow, that persons, who have mere equitable interests, are as well entitled to file a bill for redemption, as they had the legal estate.

As to the alleged improbability, that this was the intention of the Legislature, how does the case stand? The Lords had got, by the aid of the Statute, a severe remedy against their tenants, for mere non-payment of rent; and as before the Act, tenants were entitled to relief (for it was only payment of the rent which the landlord had a right to) for mere money, which, therefore, admitted of compensation.

so this right to relief continued. Is it likely that the Legislature intended to take away the right of those, who were entitled to the whole beneficial interest, and to save the right of redemption only for the holder of the mere legal estate? Is that a probable intention to impute to the Legislature? Am I now to cut down the rights of all the tenants in Ireland, who have equitable interests, and deprive them of their equity to redeem those interests on payment according to the directions of the Statutes? I should come to such a conclusion with great reluctance; but I am not obliged to do so.

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v.  
GERAGHTY.  
Judgment.

The Statute, 11 Anne, contains an express saving of the rights of mortgagees out of possession, who were not to be affected by the Act; and in the next Statute on this subject, the 4 Geo. I.(a), there is contained a like saving as to mortgagees of the lease, or of any part thereof. Now suppose the case of a mortgagee of all the interest in the lease, but not in possession, and the landlord to bring his ejectment, and recover, and go into possession; could not the mortgagee have come at any moment against the landlord? What has the landlord recovered? The tenant, although entitled to the equity of redemption, was but a mere tenant at will, holding under the mortgagee? The landlord has become owner of the equity of redemption, it is true; but under the two Acts which I have referred to, I apprehend that the mortgagee could have come in at any time, within the period prescribed by the general rules of the Court, to redeem. I have put this case to shew that the Act was contemplating equitable interests, and that, save so far as it restricted the period of filing the bill, in

(a) Chap. 5.

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*Judgment.*

the particular instance specified, it did not attempt to interfere with the general jurisdiction of the Court.

The next Statute upon the subject was the 4 Geo. I. and this also speaks in the same terms "of other persons or persons claiming or deriving under the said lease." required more than one year's rent to be due, and then the matter as it stood under the Statute of Anne. The 8 Geo. I. followed; it enabled the mortgagee, or his assignee, to redeem the evicted lease without filing a bill, and tender of the rent and costs; it required that notice should be given that the ejectment was brought for non-payment of rent; and as it was also necessary for the landlord to give notice of the ejectment to the mortgagees, it provided that unless such mortgages or assignments were registered it should not be necessary to serve notice; thus requiring registry, that the landlord might know whom to serve with the summons in ejectment. Now in these Statutes there is nothing to take away or defeat the old equity of the tenant. I am bound, it is true, by all the provisions of these Acts of the Legislature, but I am not bound by implication to take away pre-existing established rights.

It is said, however, that all the authorities are opposed to this view of the law, and I proceed to consider the justice of that observation. In the case of *Berney v. Moore* (1) in the House of Lords in this country, the opinion of six out of seven of the Judges was, that the evicted lease might be set up by an under-lessee; but it was said, that although the under-tenant was comprehended under the Statute, he was at liberty to file a bill, still if he was guilty of fraud

(a) Chap. 5.

(b) 2 Ridg. P. C. 310.

Court of Equity had not its hands so bound up, as to be obliged to make a decree in his favour. Now what does this prove, unless that the original jurisdiction of this Court is not taken away, and that it is still at liberty, within the limits of the Statutes, to judge of the conduct of parties.

The case itself is not well reported, but the facts sufficiently shew the grounds upon which, in affirmance of two decrees of the Court of Chancery (for it appears that the cause had been re-heard), the bill was dismissed. In the first place, the bill was not filed at all within the provisions of the Tenantry Acts, but upon the general principles of the Court, charging that the landlord and his immediate tenant were in collusion, for the purpose of defeating the rights of the under-tenant. Subsequently, no doubt, the Plaintiff filed an amended bill, stating that he had lodged all rent and costs within the six months, and praying that he might be restored to the possession of the lands, from which he had been turned out. But then it appears that too little money was paid into Court upon account of costs. And lastly, it would seem, from the seventh question proposed to the Judges, that some material deed had not been properly proved in the cause. The bill was evidently dismissed upon the merits, and upon grounds quite collateral to the Tenantry Acts; and the case appears to me to be a great authority in support of my view of the subject.

It is said that the Court is not at liberty to go out of the Statute, and cannot exercise the slightest discretion: yet the case of *Ryan v. —(a)*, which has been cited, where the party was prevented, by reason of a snow-storm, from filing his bill, and lodging the rent and costs within

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v.  
GERAGHTY.  
Judgment.

(a) Cited in *Bodkin v. Vasey*, 1 Jones, 146.



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 ———  
*Judgment.*

the six months, establishes directly the contrary: for there the Court granted the tenant relief upon its general jurisdiction, and independently of the Statute, considering that the delay was occasioned by an accident. In the case of *Beasley v. D'Arcy(a)*, again we find the Court acting upon its general equitable jurisdiction. There the tenant did not lodge the arrears of rent in Court, according to the provisions of the Statute, but he had an unascertained unliquidated demand against the landlord, an equitable set off against the arrears of rent, and, although no such thing is mentioned in the Act, yet the Court relieved the tenant against the legal right of the landlord. Again, in the last case upon this subject, which came before Lord *Redesdale*, *Biddulph v. St. John(b)*, the tender being made in bank-notes was not a good tender at law, nevertheless the Court expressed a decided opinion, that such a circumstance fell within the class of accidents, which, by preventing a compliance with the legal forms, thereby afforded a clear ground for equitable relief: this, then, is another authority to shew that equitable relief may be administered by the Court beyond the limits of these Acts of Parliament.

The Act of the 8th Geo. I. c. 2, enacted, that all mortgages should be registered, and that in default of registration the landlord might proceed with his ejectment, without serving the summons in ejectment on the mortgagee. *Biddulph v. St. John(b)* there was an unregistered mortgage, but it was proved that the landlord had notice of the mortgage. The landlord had not thought proper to serve the mortgagee claiming under this unregistered instrument with the ejectment, yet Lord *Redesdale* held that the law

(a) 2 Sch. & L. 403 (n).

(b) 2 Sch. & L. 521.

Lord was bound to serve the mortgagee, and gave relief, considering it unconscientious in the landlord, who had notice, to set up the objection of non-registry. This is another instance of relief being given, out of the provisions of the Statutes, upon the general equity by which this Court is guided. I am not surprised to find that such is the case, and that the general jurisdiction exists as it did before the Statutes were passed; that the law is rational, and just what it ought to be.

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v.  
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Judgment.

I am therefore of opinion that such an equity as I have shewn to have prevailed antecedently to the Statutes still exists, and then the question arises as to the frame of this suit, and whether, though in any other case such a bill could have been sustained, the present one can be supported. The bill is filed by the persons who are entitled to redeem against the landlord, and the personal representative of the trustee, who is entitled to the legal interest under lease; and the circumstance, that the party who thus has the legal estate is a mere personal representative, in my opinion fully accounts for the fact of her having declined to act, and of her being now a Defendant and not a co-Plaintiff upon this record. The suit is therefore properly framed: it brings before the Court the legal owner; and, in reference to the argument at the bar respecting the mode by which this lady and her children are to be put into possession, I do not apprehend that any difficulty can arise; the decree will provide for this, and the rights of the landlord will not in any degree be interfered with.

With respect to the title of *Malone*, no doubt the statement in the bill is ambiguously framed; but still he is stated to be a mortgagee, and he has been treated by the

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Judgment.

Defendant, Mr. *Geraghty*, as such. He was actually served with the ejectment, and on a former occasion, when these very premises were under a similar ejectment, the money for the redemption of them was paid by *Malone*; then there is the letter of the 24th of May, to which I particularly adverted on the former hearing. All these circumstances shew clearly that the title of *Malone* was known to Mr. *Geraghty*. But still further, *Malone* was not a mere mortgagee by deposit of deeds, for there was an actual agreement in writing to execute a legal mortgage. An objection has been taken to the mode in which this agreement has been proved, for that, notwithstanding there was an attesting witness, that witness has not been examined, but the handwriting of the party has been proved by a different witness. No doubt this is wrong; but can I permit one counsel on one occasion to allow a document to be read without objection, and another counsel, on a rehearing, to insist upon an objection to proof, which might have been urged on that former occasion? If I had reason to entertain any suspicion with regard to the document, I should, under the circumstances, allow the Plaintiffs to put an interrogatory to the witness to prove the agreement. In this case, in addition to the circumstances connected with *Malone's* title, it is not to be lost sight of, that the co-Plaintiffs on this record are the parties entitled to the whole equitable interest in this lease. The case is of so much general importance, for it goes to the root of the title of every tenant in Ireland, that I do not mean to part with it until the first day of next Term; but as to a case for a court of law, I cannot comply with the application: the question is one altogether of equitable jurisdiction.

With regard to the question of costs, *primâ facie* the

landlord is entitled to them: but it is perfectly clear that by his misconduct he may forfeit this right. On the former hearing I gave the costs of the suit against the landlord, being under a strong impression that his conduct had occasioned this suit; and it is impossible to deny that the suit has been caused by the Defendant's putting his right to resist the redemption upon his legal title. However, during the course of the present argument, my mind has fluctuated with respect to the costs, in consequence of the complicated state of the relation of the parties; and as I have reserved the principal question in the cause for further reflection, I will again consider the disposition of the costs of the suit.

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MALONE  
v.  
GERAGHTY.  
Judgment.

THE LORD CHANCELLOR on this day said that he had most carefully considered the case during the vacation, but that he saw no reason to alter the opinion he had expressed on the former occasion; that he had directed a search for precedents, which had been accordingly made, but that nothing had resulted therefrom to support the position, which had been put forward on the part of the Defendant; that he should, therefore, affirm the decree, and dismiss the petition of re-hearing, but without costs.

April 19.

1843.

HAYES v. BRIERLEY.

Jan. 13.

Where the Defendant does not appear at the hearing of the cause, the Plaintiff must make out his case, and establish his right to the decree which he asks for.

IN this case there was no appearance on the part of the Defendant.

The *Attorney-General*, for the Plaintiff, proposed to take such decree as the Plaintiff could abide by.

THE LORD CHANCELLOR :—

This has been the practice hitherto, but my attention has been lately called to it, and I think that our practice here in this respect has been wrong. In England, when the Defendant did not appear, the decree was conditional, and therefore the Plaintiff took such decree as he could abide by. But in this country, the decree is absolute in the first instance, and the Plaintiff should, therefore, always make out his case, and shew his title to the relief, which he seeks. I observe, however, that by one of the late Orders<sup>(a)</sup> in England, it is now provided, that where the Defendant makes default at the hearing, the decree shall be absolute in the first instance, and therefore I suppose the rule will be adopted, which I mean in future to act upon, namely, to require the Plaintiff to make out his case fully, and establish his right to the decree he asks for<sup>(b)</sup>.

(a) "That where a Defendant makes default at the hearing of a cause, the decree shall be absolute in the first instance, without giving the Defendant a day to shew cause; and such decree shall have the same force and effect, as if the same had been a decree *nisi* in the

first instance, and afterwards made absolute, in default of cause shewn by the Defendant."—*Gen. Orders*, xlv., Craig & P. 381.

(b) See *M'Conn v. O'Connor*, 2 Drury & W. 42; and *Meskill v. Dunworth*, 4 Ir. Eq. R. 681.

The case then proceeded, and the Plaintiff obtained a decree.

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HAYES  
v.  
BRIERLY.

MANNIX v. DRINAN.

THIS was an application to amend a decree, subsequent to its enrolment.

Jan. 14.

After a decree has been enrolled, the Court has no jurisdiction to correct a clerical error upon motion.

By the Master's report in the cause it was found that upwards of forty different denominations of land, including premises named "Cloghduane, Killimonogue, Scart, and houses in Barrack-street," were liable to the debts of *Andrew Drinan* deceased, due by him to the Plaintiffs. In the decree for a sale, founded upon this report, these premises were omitted from the enumeration of the lands directed to be sold.

It was stated, by the affidavit of the Plaintiffs' solicitor, that the omission was accidental, and a mere clerical error. The present motion was, that the said premises might, by insertion, be included in the enumeration.

Mr. Serjeant *Warren* and Mr. *Orpen*, for the Plaintiffs, referred to *Weston v. Haggerston*(a), and Sir *Richard Bolton's* order, No. 25(b). This order, it was contended, was not rescinded by the General Order of 1834, No. 177.

Mr. *Pigot* and Mr. *Deasy* for the Defendants.

(a) Coop. 135.

(b) *Smith's Orders*, 13.

1843.

THE LORD CHANCELLOR:—

MANNIX

v.

DRINAN.

Judgment.

This may be a mere clerical error, although, on re to the report, I cannot well see how the omission have been accidental; but, in my opinion, I have no diction to amend the decree. The Rules of 1834 n considered as the Rules of the Court, and whoever this Rule clearly considered that after the enrolment decree even mere clerical errors could not be cor I think, however, the order should be amended, u hear some good reason to the contrary(a).

(a) A clerical error in a de- & W. 285. As to the  
cree may now be amended at any which the Court will, on  
time upon motion or petition.— or petition, set aside a de  
*Gen. Order*, ciii.

See *Tilson v. Lawder*, 2 Drury

*Morison v. Morison*, 4 M  
C. 215, 228.

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### WISE v. BERESFORD.

Jan. 14, 16,  
18.

A grant of an annuity charged upon a benefice for the life of the incumbent, is not prohibited by the Statute law of Ireland; but is, on the contrary, valid and binding upon the grantor during his own incumbency.

The object of the Statute

10 & 11 Car. I. c. 3, was, to protect the successor, and not to impose any restraint parson himself.

A judgment, as such, and until sequestration issued, does not give such a li benefice as will enable the judgment creditor to rank in priority over other d therefore, in this case, where the judgment bore date in 1831, but the sequestr not issue until 1841, the Plaintiff, whose deed of annuity was executed in 1835, entitled to priority over the judgment creditor.

BY deed of annuity dated the 15th of May, 1835, an between the Rev. *William Beresford*, rector of Inn of the first part, *Thomas Wise* of the second part *Francis Wise* of the third part, reciting that the sai *Beresford* was then seised and possessed of the gleb and tithes, both great and small, of the rectory of carra, in the county of Cork; and that he had con to sell unto *Thomas Wise* an annuity of 229*l.* 3*s.* his life, for the sum of 2083*l.* 6*s.* 8*d.*, chargeable u

said glebe lands and tithes, and to be further secured by the bond of the said *Wm. Beresford*, with warrant of attorney for confessing judgment thereon in the penal sum of 4000*l.* conditioned for the payment of said annuity ; the said deed witnessed, that in pursuance of the said agreement, and in consideration of the said sum of 2083*l.* 6*s.* 8*d.* the said *Wm. Beresford* granted unto the said *Thos. Wise*, for and during the life of the said *Wm. Beresford*, an annuity, or annual sum of 229*l.* 3*s.* 4*d.* issuing out of and charged upon the said glebe lands and tithes belonging to the said rectory of Inniscarra.

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WISE  
v.  
BERESFORD.  
—  
Statement.

The deed contained powers of distress and entry, in case the said annuity should fall into arrear : and for the better and more effectually securing the punctual payment of the said annuity, the glebe lands and tithes were demised to *Francis Wise*, his executors, administrators, and assigns, for the term of ninety-nine years, in case the said *Wm. Beresford* should so long live, in trust, by demise, mortgage, or sale of said glebe lands and tithes, or by perception of the profits thereof, to satisfy and discharge the said annuity and all arrears thereof.

The deed contained the usual covenants in the event of *William Beresford* being preferred to any higher ecclesiastical dignity, to convey and assign all the benefits thereof, which might be lawfully granted, unto the said *Thomas Wise*, his executors, &c. : and also a provision that it should be lawful for the said *Thomas Wise*, his executors, &c. to issue execution on the bond of the said *William Beresford*, and to cause such proceedings to be taken under such execution, so as that the Bishop of the diocese should allocate, by sequestration or otherwise, a sufficient portion



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of the income arising from such rectory in and towards the payment of the said annuity: and that such execution should be marked for the sum of 4000*l.*; to the end and for the purpose of obtaining an allocation of an amount sufficient to pay the said annuity.

This deed was enrolled in the Court of Chancery shortly after its execution, and registered; and judgment was entered upon the collateral bond, in Easter Term, 1835.

In the year 1831, and previously to the grant of this annuity, the said *William Beresford* had executed to *Mary Newman* a bond for 1200*l.*, with warrant of attorney for confessing judgment thereon: upon this bond judgment was entered in or as of Michaelmas Term, 1831. In Trinity Term, 1841, this judgment was revived, and a writ of *fieri facias* issued, marked for the sum of 1229*l.* 10*s.* 6*d.*, and directed to the sheriff of the county of Cork, who returned *nulla bona*, but certified that the Defendant was seised of the said benefice of Inniscarra: whereupon *Mary Newman*, on the 3rd of November in the same year, sued out a writ of *sequestrari facias*, directed to the Bishop of Cork, which was lodged with the Bishop on the 4th of November. Upon the 9th a sequestration issued, directed to *o Robinson*, and upon the 14th of the same month the sequestration was duly published in the parish church of Inniscarra.

*Beresford* having neglected to pay the annuity granted by the deed of the 15th of May, 1835, the Plaintiff, *Thomas Wise*, with his trustee, *Francis Wise*, filed the present bill on the 11th of January, 1841, for the purpose of raising the arrears of the said annuity: and on the 28th of January,

1842, they amended the bill by making *Mary Newman* a party Defendant, and praying that the priorities of the Plaintiff, *Thomas Wise*, and the said *Mary Newman*, might be declared.

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*Mary Newman*, by her answer, set forth the facts already stated in relation to her judgment; and submitted that the deed of annuity of the 15th of May, 1835, was not a specific incumbrance on the said benefice, and was wholly void; but that, at all events, by reason of the proceedings taken, and the writ issued on foot of her judgment, she was entitled to priority over the Plaintiff's demands.

Mr. Serjeant *Warren*, Mr. *William Brooke*, and Mr. *Jenkins*, for the Plaintiffs. Argument.

This case presents two questions for the consideration of the Court: the first respects the validity of the grant of the annuity; and the second, the relative priorities of the Plaintiff, *Thomas Wise*, and the sequestration creditor, *Mary Newman*. With regard to the first, it has been considered as settled by the case of *Robinson v. Wynne*(a), in the Court of Exchequer in this country; for though that case does not decide the point now raised, yet the principle of that case, and the opinion of the Court there expressed, are in the Plaintiff's favour, and the case itself has been frequently acted upon: it was followed and mentioned, without disapprobation, by Sir *Michael O'Loghlen*, in *Kenny v. Cumming*(b): and previously Sir *William Mac Mahon* had acted upon the same principle in *Stronge v.*

(a) *Hayes*, 336.

(b) *Flan. & K.* 321.

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*Ormsby*(a). *Metcalf v. The Archbishop of York*(b), establishes the proposition that, independently of Statute, the law is nothing objectionable or contrary to the general policy of the law in such a grant. But a careful examination of the Statutes themselves, without the aid of authority, is quite sufficient to shew that the objection relied upon by the Defendant cannot be sustained. The Statutes 10 & 11 Car. I. c. 2, and the 10 & 11 Car. I. c. 3, were obviously passed for the protection of the successors of the grantor, and not the grantor himself. In the second section of the latter Statute it is provided, that ecclesiastical dignitaries may make leases for a limited period, and under particular restrictions, one of which was, that one-half of the true value of the demised lands should be reserved; and the Statute goes on to provide, that such leases shall be liable to be questioned by the successor or successors of the lessor. The earlier Statute enacts, that the leases shall be in force only so long as the incumbent is resident, without absence above eight days in one year. The reasoning of Chief Baron *Joy* on those two Statutes, in *Robinson v. Wynne*, appears to be unanswerable, and shews conclusively, that the enactment applies only to an avoidance of the grant in favour of the successor, and not to an avoidance in favour of the grantor himself. It may be said, that the earlier of the Statutes, the 10 & 11 Car. I. c. 2, has been repealed by the 5 Geo. IV. c. 91, but that does not touch the argument derived from the effect of its interpretation of the other Statute, 10 & 11 Car. I. c. 3. The cases upon the Statutes in England, 13 Eliz. c. 20, and 14 Eliz. c. 11, do not apply, for the phraseology of the Statutes in the two countries is very different. The argument at the other side on this point

(a) 2 Hog. 55.

(b) 6 Sim. 224; 1 Mylne & C. 54.

if good for any purpose, would have the effect of invalidating the Defendant's own charge. With regard to the question of priority between the Plaintiff and *Mary Newman*, it is in like manner decided by *Robinson v. Wynne*. As a judgment creditor, the Defendant only ranks from the date of her sequestration; *Cottle v. Warrington(a)*, *Bennett v. Apperley(b)*, *Silver v. The Bishop of Norwich(c)*, *Sterling v. Wynne(d)*.

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The *Attorney-General* and Mr. J. S. Townsend, for the Defendant, *Mary Newman*.

The doctrine laid down by Chief Baron Joy, in *Robinson v. Wynne(e)*, rests upon very insufficient grounds, and cannot be supported. The case itself is not a decision upon the question. It will be admitted, that in England such a charge would be beyond all dispute void, *Saltmarshe v. Hewett(f)*. *Metcalfe v. The Archbishop of York* is not a decision to the contrary, for in that case the grant, which was held good, was made in the year 1803, during the interval between the passing of the Statute 43 Geo. III. c. 84 (which repealed the 13 Eliz. c. 20), and the 57 Geo. III. c. 99, which revived that Act, and restored the law to its former state. What is there, then, in the Irish Statute, which would make the law different in the two countries, and prevent the application of the decisions in England? It is clear that the policy of the Legislature in each country was the same—to prevent the clergy from alienating the income, which they derived from their benefices. It is said, that the Statutes were passed for the protection of the successor. But there is nothing in either of the

(a) 5 Barn. & Ad. 447.

(b) 6 Barn. & C. 630.

(c) 3 Swanst. 112.

(d) 1 Jones, 51.

(e) Hayes, 336.

(f) 1 Adol. & E. 812.

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Acts to shew this; the words are as general as they possibly could be. The preamble of the earlier of the Statute is opposed to this view, for it recites that it was enacted "for the due maintenance of such as shall teach and instruct the people in the worship of God, and the better to enable them to keep hospitality, and relieve the poor. The Act itself does not expressly permit any charge, but declares that such charge shall stand in force only so long as the parson "shall be resident upon his benefice, without absence above eighty days in any one year, and for no longer further, or other time." The latter Act provides that leases, &c., charges and incumbrances, upon benefices made by ecclesiastical persons, "shall be utterly void and of no effect, to all intents, constructions, and purposes," except leases and grants made in pursuance of that Act, or any other Act made or to be made in the same parliament. Nothing can be more general than such language. But further, if to shew that the Statute was not merely intended to protect the successor, it includes within its provisions corporations aggregate, such as colleges and hospitals, which could have no successors, as well as persons ecclesiastical, who could. The difficulty in cases of this kind, in fact, appears to have arisen from the inconsistency between these two Statutes, which, though passed in the same session, appear to be manifestly opposed to each other. The Court will, however, be relieved from this difficulty, by the fact of the earlier Statute 10 & 11 Car. I. c. 2, having been repealed by the Statute 5 Geo. IV. c. 91. The case, therefore rests upon the Statute 10 & 11 Car. I. c. 3, and the Court cannot take into its consideration, or act upon, a repealed Statute. With respect to the Defendant's own charge, its validity is not in the least impeached by this argument, because it is admitted that a judgment against a clergyman is valid, unl

it is confessed with a view and for the purpose of charging his benefice. This distinction is recognized in *Saltmarshe v. Hewett*. The judgment of the Defendant, *Mary Newman* was the ordinary one which would have been obtained, had Mr. *Beresford* been a layman ; and being also prior in point of time, she is on both grounds entitled to the benefit of it in priority to the Plaintiffs.

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Mr. *Jenkins*, in reply.

The LORD CHANCELLOR on a subsequent day stated, that he wished to hear one counsel on each side, upon the point of priority only of the parties' demands.

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Mr. Serjeant *Warren*, for the Plaintiff.

By the first provision of Magna Charta(a), all ecclesiastical persons were to enjoy "*omnia jura sua integra, et libertates suas illasas*," that is, as Lord Coke renders it, "all their lawful jurisdictions, and other their rights, wholly, without any diminution or subtraction whatsoever." At common law, no *levari* could issue upon a recognizance against ecclesiastical persons : "If a person be bound in a recognizance in the Chancery, or in any other Court, and he pay not the sum at the day, by the common law, if the person had nothing but ecclesiastical goods, the recognizee could not have had a *levari facias* to the sheriff, to levy the same off these goods ; but the writ ought to be directed to the Bishop of the diocese, to levy the same off his ecclesiastical goods"(b). Now it is to be remembered, that the Statute of Westminster, which gave the writ of *elegit*, did not confer any new right, or take away the privilege

(a) 2 Inst. 2.

(b) 2 Inst. 4.

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which the law gave. Lord *Coke* says(a), “ It is to be observed, that the general words of this Act do not take away the privilege which the law giveth to any person; and, therefore, no *elegit* upon this Act shall be sued against the heir of the conuzor, during his minority.” In *Rolle’s Abridgement*(b), it is laid down, that a copyhold is not extendible under an *elegit*; and the reason given is, because that would be prejudicial to the lord: *Gilbert on Executions*(c). Again, it is said that an *elegit* does not lie of the glebe belonging to the parsonage or vicarage, or to the church-yard, for these are each *solum Deo consecratum*(d). Now previously to the passing of the 3 & 4 Vict. c. 104, it was only by means of an *elegit*, that a judgment could have been made a charge upon freehold property. How, then, could it have been made a charge upon a benefice? The observations made by Mr. Justice *Parke* and Mr. Justice *Littleton*, during the argument in *Cottle v. Warrington*, shew that they considered that the judgment, *qua* judgment, did not affect the benefice. In *Sterling v. Wynne*(e), Chief Baron *Joy* distinctly states, “ that a judgment does not bind ecclesiastical property; an ecclesiastical benefice is only bound by the sequestration:” and in that case it was held, that the priorities of the different judgment creditors were determined according to the date of their sequestrations.

The *Attorney-General*, for the Defendant, *Mary Newman*.

It was formerly supposed, that ecclesiastical persons had not power to charge their benefices. Thus in *Arbuckle v.*

(a) 2 Inst. 396.

(b) Tit. Execution (M. 2).

(c) Page 39.

(d) Gilb. 40: Jenk. 207, pl. 36

(e) 1 Jones, 51, 63.

*Contan(a)*, it was held, that the profits of an ecclesiastical benefice did not pass to the assignee of an incumbent, who had been discharged under the Insolvent Acts. But this doctrine, though it is quite sound as to direct incumbrances and grants, cannot be sustained where the charge is indirect, as, for instance, a judgment. In England, in the interval between the Statute of 43 Geo. III. c. 84, and the 57 Geo. III. c. 99, when there was no Statute in force restraining alienation by clergymen, several cases arose upon the effect of conveyances executed by clergymen. In *Doe v. Somerville(b)*, it was held, that a conveyance of a rectory, glebe lands, &c., was valid, and that the grantee might recover in an ejectment. *Doe v. Gully(c)* is to the same effect, and *White v. The Bishop of Peterborough(d)*. In this latter case, Lord *Eldon*, in delivering his judgment, says, "where a creditor of a clergyman seeks to obtain payment of his debt by judgment and sequestration, he is, in the contemplation of this Court, in the same state as any other creditor, who has taken out execution; and a creditor, having taken out execution, cannot hold property against an estate created prior to his debt." This shews plainly the opinion of Lord *Eldon*, that a judgment affected an ecclesiastical benefice from the time of its entry; and that in this respect there was not any distinction between the case of a clergyman and that of any other person.

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THE LORD CHANCELLOR:—

There are two questions in this case; first, whether the Statute law does not prohibit the charge upon a benefice

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(a) 3 Bos. & P. 321. See (c) 9 Barn. & C. 344.  
*Stronge v. Ormsby*, 2 Hog, 57. (d) 3 Swanst. 109, 116.  
(b) 6 Barn. & C. 126.



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of any incumbrance? Secondly, if there is no such prohibition, whether the judgment creditor, whose judgment is prior, but whose sequestration was subsequent, to the registered deed, is entitled to priority over it?

So far as regards this last point, supposing I should be of opinion, that there is not any thing in the Statute to prevent a clergyman from charging his benefice with a judgment, which have been just cited, are conclusive shew that it may be made the subject of conveyance that glebe land belonging to the rectory may be recovered by ejectment. How far that is consistent with the ancient law, is a different question. The right of the Plaintiff is as strong as if a conveyance had been made to him of the property. But the question which I am now considering is, what is the operation of a judgment prior to the conveyance, thus conveying the property, but upon which a sequestration has not been obtained until subsequently? It has been clearly shewn not to be a case within the Statute of Westminster. It is also clear that the Plaintiff cannot have execution at common law; he must first have recourse to the Bishop, and by this mode obtain a sequestration. The creditor gets a process, no doubt; but it is a process not at common law, or by reason of an actual direct charge, but indirectly, by the aid of the Ecclesiastical Court. The sequestrator is accountable to the Bishop; he is a mere bailiff; he cannot maintain an action<sup>(a)</sup>; he cannot bring an ejectment, like a judgment creditor; he is nothing more than a mere bailiff or agent. The judgment, undoubtedly, enables the creditor to obtain a sequestration; but I cannot see how it is made out, that a judgment, *qua* judgment

(a) See *Harding v. Hall*, 10 Mees. & W. 42.

gives such a lien on a benefice, or creates such a charge, as will enable the creditor to rank in priority over other debts. In my opinion, it does not. But as the question is a legal one, if the Defendant desires it, I will direct a case for the opinion of a Court of law.

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[The *Attorney-General* having declined to take a case, his Lordship proceeded thus:—]

As to the first question, whether the Statute law of this country does not prohibit the charge of any incumbrance upon a benefice, it was decided in favour of the charge, in *Robinson v. Wynne(a)*, which has since been frequently followed. But the case before me, it was said, was intended to be an appeal from that judgment; not that I have any power to reverse a decision of the Court of Exchequer, although I am not bound to follow the decision, if I deem it erroneous.

It was insisted by the *Attorney-General*, that the charge was void under the first section of the Statute 10 & 11 Car. I. c. 3, and that the seventh section of the Statute 10 & 11 Car. I. c. 2, could not prevail over the express enactment in the later Statute, which extended to the grantors as well as to their successors. The Statute was compared with the 13 Eliz. c. 20, although it was admitted that there were words there which are not to be found in the Irish Statute.

The Statute 10 & 11 Car. I. c. 2, which intended to increase the property of the Church, provided that all leases, &c., charges, and incumbrances, by any parson or other

(a) *Hayes*, 336.

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beneficer, should be effectual for such time only as such parson, &c., should reside, without absence for above eight days in one year, and for no longer, further, or other time and the Statute 10 & 11 Car. I. c. 3, avoided all grant charges, and incumbrances, by the dignitaries of the Church, parsons, &c., other than such leases as by that Act or any other Act made, or to be made, in the then Parliament, were or should be expressed.

It appears to me, that the object of the second Statute was to protect the successor, and not to put any restraint upon the parson himself. The leases excepted were to bind the successor; and the rents upon them are, by the fourth section, secured to the successor. The preamble to the Act, which has been relied upon on both sides, I think proves that the successor was the person intended to be protected. It would be a violent construction of these two Statutes, to consider them as clashing with each other; and there does not appear to me to be any necessity for such a construction. The second section of the first Statute shews that leases, charges, and incumbrances by parson would, in the view of the Legislature, as clear as they would (there having been no previous disabling Statute), be valid against him; and therefore, in order to ensure residence, the Statute avoided such leases, charges, and incumbrances, in case of non-residence; but this provision would have been absurd, if the accompanying measure was to prevent the creation of any such incumbrance, properly so called. By the first Statute there was also an enabling power to parsons over certain glebe lands. This, I think, is the power referred to in the exception in the first section of the second Statute. The two Acts are, I think, perfectly consistent, and have different objects.

The first is confined to parsons, &c., and is partly a disabling and partly an enabling Statute; and, so far as it left to parsons their former power, it is perfectly clear that they might still incumber their benefices, so as to bind themselves. The second Statute, by its general prohibition, prevented even parsons from binding their successors, unless under the enabling powers in that and the former Statute, or by the leases thereby saved; so that after that Statute, a parson could not, even with the consent of the patron and ordinary, make a lease contrary to the prohibition, so as to bind his successors. The disabling clause in the later Statute embraces parsons and vicars; whilst the enabling clauses in that Statute empower them to grant leases of only certain subjects. It would have been altogether inconsistent to have treated them, in the first Statute, as having power to grant leases and incumbrances over any part of the benefice; and in the second Statute, to have wholly disabled them to create any incumbrance, properly so called, and then only to have enabled them to have a very limited portion of the property of the benefice. But this inconsistency does not exist, if the avoidance in the first Act be limited to the parson personally, and that the second be confined to the successor. Now the first Act, that is, the seventh section of it, is clearly confined to the grantor, the incumbent; for the avoidance must happen in his time, and cannot fall in that of the successor. The avoidance operated by the second Act extends to the successor, and the only question is, whether it is confined to the successor? and in my opinion it is, except that, no doubt, it would avoid a lease for non-residence against the parson himself, although made with the consent of the patron and ordinary, and conformably to the rules prescrib-

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ed, so as to bring it within the exception in the disabling clause in the 10 & 11 Car. I. c. 2.

The case does not stand upon the same footing with a case depending upon the English Statute. The 13 Eliz. c. 10, avoided all leases, &c., by parsons, amongst others, which should not conform to the rules thereby prescribed. This was a disabling Statute, for the benefit of the successor, and in that respect it corresponds with the second Irish Statute, although the latter is more comprehensive. The 13 Eliz. c. 20, contains a provision similar to that in the seventh section of the first Irish Statute, except that it is confined to leases. But this clause is added in the English Act, "that all chargings of such benefices, with cure hereafter, with any pension, or with any profit out of the same, to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this Act, shall be utterly void." Now the English Acts, unlike the Irish ones, first enacted the general prohibition, and then imposed the particular restraint. This settles the point, for it proves that the general disabling Statute did not operate to prevent parsons, &c., from creating incumbrances binding on themselves, for if it did so operate, it was useless to avoid all incumbrances in the particular instance of non-residence. But further, the Legislature, in the time of Elizabeth, intended to allow leases to be still made by a parson, so as to bind himself, provided he resided, but to prohibit him from incumbering his benefice; and therefore the avoidance, in case of non-residence, is confined to leases, whilst a general avoidance is added of all incumbrances. If the 13 Eliz. c. 10, had already prohibited every charge (except a lease

made conformably with its provisions), such an enactment would have been wholly unnecessary. The Irish Statutes were drawn on the pattern of the several English Statutes, where the English rule was adopted ; but in this instance, as the Irish Legislature meant, so they expressed, a very different provision ; they intended to allow not only leases, but also incumbrances made or created by a parson to bind himself, provided he resided, and therefore, instead of confining the avoidance for non-residence to leases, as in the English Statute, they extended it to charges and incumbrances, and of course, therefore, omitted altogether the concluding clause in the English Statute 13 Eliz. c. 20, which I have already stated. This leaves the case, I think, free from doubt.

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But then it was argued by the other counsel for the Defendant, that although the 10 & 11 Car. I. c. 3, bound the parties as well as their successors, yet that by the exception of the leases in the first section, it still supported the seventh section of the prior Statute. Now I think the exception in the latter Statute referred to the eighth section of the earlier Act, which was an enabling clause, and not to the seventh ; but this view thus taken was inconsistent with that upon which the *Attorney-General* relied. It was followed up by insisting that the repeal of the seventh section by the 5 Geo. IV. c. 91, removed all difficulty, and left the general prohibition in the 10 & 11 Car. I. c. 3, in full operation. But supposing that the first part of the argument could prevail, of which I have already disposed, yet the latter point is without foundation, for the seventh section in the first Statute is only made use of in order to shew the true meaning of the first section of the 10 & 11 Car. I. c. 3, at the time it passed ; and therefore the simple repeal

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of the seventh section in the first Act, without any new prohibition applying to this case, can have no bearing upon the question now before the Court.

For these reasons, I am of opinion that the case of *Robinson v. Wynne* was rightly decided, and that I am bound to follow it.

Decree.

Declare the rent-charge, or yearly sum of 229*l.* 3*s.* 4*d.* sterling, created by the indenture of the 15th of May, 1835, with the arrears and accruing gales thereof, to be well charged upon the rectory and vicarage of Inniscarra, situate in the county of Cork, in the pleadings mentioned, and the glebe lands and tithe rent-charge payable in respect of the same, during the incumbency of the Defendant, the Rev. *William Beresford*, and to have priority over the demand of *Mary Newman*, the sequestration creditor in the pleadings named. Refer it to the Master to take an account of what is due to the Plaintiff, *Thomas Wise*, for arrears of such rent-charge, or yearly sum; and let the Master continue the said account up to the gale day preceding the making of his report. Let the Plaintiffs be paid their costs incurred in this cause, in equal priority with the said demand of the Plaintiff, *Thomas Wise*, and refer it to the Master to tax and ascertain the same accordingly. Refer it to the Master to take an account of what is due to the Defendant *Mary Newman*, on foot of her demand, as such sequestration creditor as aforesaid; and let the said *Mary Newman* be paid her costs in this cause, in equal priority with her said demand, and refer it to the Master to tax the same. Let the receiver appointed in this cause, by order bearing date the 16th of November, 1841, be continued.

and let such receiver, out of what now is and shall hereafter come to his hands, in respect of the glebe rents and tithe rent-charge of the said rectory and vicarage, be at liberty to pay all such sums of money as the Defendant, the said Bishop of Cork, Cloyne, and Ross, shall by certificate under his hand, from time to time direct, for the purpose of providing for the cure of souls in the said rectory and vicarage, and for the other ecclesiastical outgoings of the said benefice. And also pay the Plaintiffs what shall be found due to the Plaintiff *Thomas Wise*, on the taking the said account, for arrears of the said rent-charge, or yearly sum of 22*9*l. 7*s.* 4*d.*, together with the Plaintiff's costs in this cause; and let him from time to time pay the accruing gales of such rent-charge; and also pay to the Defendant, *Mary Newman*, as such sequestration creditor as aforesaid, what shall be found to be due to her, on taking the said account in respect to her said demand, and costs; such payment to be made according to the respective rights and priorities as hereinbefore declared. And let the said receiver have credit for all such payments, on passing his accounts, from time to time in this cause. Let the Plaintiffs pay the said Lord Bishop of Cork, Cloyne, and Ross, his costs in this cause, and let the Plaintiffs have the same over against the funds in this cause.

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*Reg. Lib.* 87, fol. 73, 1843.



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May 27.  
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THE ATTORNEY GENERAL v. THE CORPORATION  
CASHEL, WILLIAM PENNEFATHER, AND OTHERS.

In 1230, M., Archbishop of Cashel, with the consent of the Dean and Chapter, granted to the Corporation of Cashel, the town of Cashel; and also granted to the said Corporation and their tenants, and all inhabitants of the said town, free pasture in all his lands, except meadows, &c. Subsequently the Corporation became seised in fee of the soil of the lands, over which free pasture had been so granted. There was not any evidence to shew the time, or the manner, in which the Corporation became seised of

THIS was an information by the *Attorney-General*, of the relation of two citizens of Cashel, against the Corporation of Cashel, a person named *William Pennefather*, and several others. The suit was instituted for the purpose of setting aside a lease of the 13th of September 1830, of some of the Corporation lands, which had been executed to *Richard Pennefather*, under whom the Defendant, *William Pennefather*, derived.

The original information was filed on the 20th of June 1832, and the amended information on the 10th of April 1837, and it stated, that the town and Corporation of Cashel had existed from time immemorial. That in the year 1230, *Maurianus*, Archbishop of Cashel, being seised in frankalmoign of the town of Cashel, under letters patent of Henry III., by charter bearing date the 12th of July in the 14th year of his reign, with the consent of the Dean and Chapter, granted to the Provost and Burgesses of Cashel, and their successors for ever, the said town, except the soil:—*Held*, that inasmuch as the old right of pasturage in the lands of the Corporation was affected with a trust for the benefit of the inhabitants of Cashel, so the soil of the lands, which were substituted for that right, was bound by the same trust, and that whether the new right was acquired by usurpation or otherwise.

A lease for a term of ninety-nine years, made by the Corporation, to one of their own body, at a gross undervalue, was set aside with costs, the lessee was ordered to account for the rents and profits since the date of the lease, 1830, and it was referred to the Master to approve of a scheme for the application of the rents.

To prove the grant of 1230, by M., an attested copy of an enrolment of a charter of confirmation by *Roland*, a subsequent Archbishop of Cashel, found amongst the Parliament Rolls, in the Rolls' Office, and which contained an *insperimus* of the charter of grant by was admitted as good secondary evidence.

receiving and reserving to himself the bakery and shambles ; and also granted to the said Provost and Burgesses, and their successors, to their tenants and all inhabitants of the said town and burgage thereof, free pasture in all his lands, except meadows, corn lands, and manors ; and also authority to hold a hundred, and court baron, reserving out of said town and pastures, a chief rent of nine marks, and out of the hundred and court baron, one mark.

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The amended information further stated, that by charter, dated the 19th of October, 1557, *Roland*, then Archbishop of Cashel, having inspected the charter of *Maurianus*, with the consent of the Dean and Chapter, confirmed the said grant of *Maurianus*, and that under said charters, the said Provost and Burgesses were seised of those lands and pasture, in trust for the purposes therein expressed.

That by charter of the 3rd of October, in the 13th year of Charles I., the inhabitants of Cashel were incorporated, by the name of the Mayor, Aldermen, Bailiffs, Citizens, and Commons of the city of Cashel. That by another charter bearing date the 22nd of June, in the 15th year of the same reign, King Charles, in consideration of 100*s.* confirmed the rights and jurisdiction of the city, defined its boundaries, and empowered it, by its said corporate name, to acquire and possess, and to grant and demise, &c., property of what kind soever : and that this charter also granted to the said Corporation, in lieu of its ancient license to take lands in mortmain to the value of 30*l.* per annum, license to the extent of 50*l.* per annum. This charter did not mention the charters of *Maurianus* and *Roland* abovementioned.

The information then stated, that in, and previous to

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the year 1829, the Corporation were seised of a large tract of land, in and near the city, part of the lands held under the said charter of *Maurianus*, and which, if properly administered, would produce more than 2000*l.* per annum and the information charged, that the said Corporation held the same upon trust for charitable uses, and that according to the true intent and meaning of the charter of *Maurianus*, the said Corporation was bound to make the said lands as productive as possible, and to apply the rents and profits thereof for the improvement and benefit of the city of Cashel, and its inhabitants and sojourners. That the Corporation had not made said lands productive, but on the contrary, had demised the greater part thereof to members of their own body, for long terms of years; and that the entire rental thereof in 1837, only amounted 219*l.* 18*s.* 10½*d.*, by reason whereof said city had fallen greatly into decay.

The information stated, that the said rental 219*l.* 18*s.* 10½*d.*, had been applied to the payment of officers, and the repair of the market-house and streets, &c. That a considerable tract of the said lands so granted by Archbishop *Maurianus*, was called Cottyn, or, “the commons of Cashel.” That in 1732, a lease of 1264 acres of said Cottyn had been granted by the Corporation to *Richard Buckworth*, for a term of ninety-nine years, reserving a rent of 87*l.* 6*s.* 6*d.*, at a fine of 200*l.* That in the year 1822, *Mr. Bolton*, in whom the said lease was then vested, applied to *Richard Pennefather*, one of the Aldermen, and the Patron and Treasurer of said Corporation, and offered 10,000*l.* for a renewal of said lease, that this offer was declined, and that thereupon *Mr. Bolton's* agent intimated that a considerably larger sum would be given, but that *Penne*

*father* broke off the negotiation. That in 1829, when the said lease was within one year of its expiration, the said Alderman *Pennefather* purchased *Bolton's* interest for the sum of 2500*l*; *Bolton's* rental, arising from subleases, at that time being 1550*l*. per annum, and considerable arrears being due to him.

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The information then stated, that on the 29th of June, 1830, without any inquiry upon the subject, an order was made at a board of Aldermen, that a new lease of said lands, together with an additional parcel, should be made to the said *Richard Pennefather* for a term of ninety-nine years, at a rent of 93*l*. 11*s*. 9*d*. That said *Richard Pennefather* was present at the board, when said order was made, and that it was his duty, as Treasurer, to have informed the Corporation of the true value of said lands. That all the other aldermen of Cashel, at the time this order was made, were nearly connected with *Richard Pennefather*, either by consanguinity or affinity, and that pursuant to said order, a lease dated the 13th of September, 1830, was duly executed to the said *Richard Pennefather*, and that no fine was paid.

The information then stated, as evidence that the said lease was a breach of trust on the part of the Corporation, the oath of office which the charter of the 13th of Charles I. prescribed should be taken by the Mayor. This oath contained the following clause: "You shall procure such things to be done, as may honestly and justly be to the profit and commodity of this city and corporation; you shall not consent to pass any estate of inheritance in mortgage, or otherwise, in the common lands of Cashel, called the Cottyn, or any part or parcel of the same whatsoever, dur-

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ing your office, and you shall not give any way, nor consent that any assignment shall be made of or for any rent, then now is, or hereafter shall be, issuing out of the said Cotty or any part thereof, unto any manner of person or person whatsoever, for longer time than one year, unless it be for the redemption or acquittal of some part of the lands that be in mortgage from this city."

The information then stated, that Alderman *Pennefather* died in the year 1831, having bequeathed his interest in said lease to his son, the Defendant, *William Pennefather* who, at the time the lease was granted, was Mayor of Cashel, and had himself executed the lease as a grantor party, representing the Corporation. The information prayed, that the said lease of the 13th of September, 1831 might be declared fraudulent and void, and contrary to the trusts reposed in the Corporation.

The Defendant, *William Pennefather*, having, by his answer, stated a settlement of 1835, affecting the said lease, a further amended information was filed on the 30th January, 1838, bringing before the Court the parties interested under that settlement.

The Defendant, *William Pennefather*, by his answer stated that he did not believe that the Corporation of Cashel ever took any estate in the lands in question under or by virtue of the said charter of *Maurianus*; that if such charter ever existed, it was a mere device to give colour to usurpation by the Archbishop over the town of Cashel; and that from time immemorial, prior to the date of the said alleged charter, the city of Cashel was seised in absolute dominion, unfettered by any trust, of the lands mentioned

in said charter. The said Defendant further stated, that no part of the rent purporting to be reserved by the alleged charter was ever paid by the city of Cashel ; and that the Corporation did not claim title under or in any way accept the charter of *Roland* abovementioned. The answer then stated a charter of the 10th of February, 1586, by which Queen Elizabeth granted to the corporation of Cashel the power of acquiring lands to the value of 30*l.* per annum, notwithstanding the Statutes of Mortmain, and alleged that this was the license mentioned in the charter of Charles. The answer then denied that the Cottyn was part of the lands, the pasturage of which was granted by the charter of Maurianus. The statements of the bill relative to the value of the land, and the granting of the lease to *Richard Pennefather*, and his connexion with and influence over the Corporation were not controverted, but the Defendant alleged that the rent reserved by that lease was quite sufficient for all corporate purposes.

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The charter by which Henry the Third granted the town of Cashel to *Maurianus*, as recited in an indictment on the Plea Roll of the 21st of Edward III., was read in these terms : " Henry, &c. Know ye that we, &c. have remitted and quitted claim, for us and our heirs for ever, to Father *Maurianus*, Archbishop of Cashel, and his successors, the contention and claim which we had moved against the said Archbishop upon the new town of Cashel : and we have granted the same town, with its appurtenances, henceforth of us and our heirs, to hold to the said Archbishop and his successors in free, pure, and perpetual alms, free from all exaction and secular service," &c.

On the part of the relators it was then proposed to read,

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as evidence of the grant by *Maurianus*, an attested copy of an enrolment of the charter of Archbishop *Roland*, which contained an *Inspecimus* of that grant, and was discovered amongst the parliamentary Rolls. The proper searches were proved to have been made for the original, which could not be found.

*Argument.* Mr. Serjeant *Warren* and Mr. *Moore* against the admission of the evidence.

This instrument is not a grant from the Crown. It is a mere accidental circumstance that it was found among the parliamentary Rolls, which can therefore give the document no authority. The instrument was not capable of actual enrolment, for there is no difference between the grant of an Archbishop, with the consent of his Dean and Chapter, and the grant of a private individual. There is neither Act of Parliament nor rule of law as to the enrolment of private deeds: the enrolment is therefore a mere copy, and the copy of a copy is never evidence. But the original itself could not be evidence against the Defendants; it is a mere recital by an individual, without authority to make such recital, and not binding upon persons who claim adversely. The document is offered to show that the Corporation took the property subject to a trust, but there is no evidence to connect *Maurianus* with the grant to the Corporation: no payment of rent has been proved, and the document does not come out of the proper custody. *Co. Lit. (a)*; 12 Eliz. c. 2; *Gilbert on Evidence (b)*; *Lady Holcroft v. Smith (c)*; *Tinkler v. Walpole (d)*; *Lancaster v. Lovell (e)*.

(a) 225, (b).

(b) Page 86.

(c) Freem. 259.

(d) 14 East, 231.

(e) 6 Carr. & P. 437.

The *Attorney-General*, and Mr. Serjeant *Greene*, *contra*.

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THE LORD CHANCELLOR :—

I shall reserve this point, admitting the document in evidence *de bene esse*. I should have thought, however, there was not any great difficulty in the question. There is clear evidence that Archbishop *Maurianus* had the soil of the city vested in him ; and then this instrument, executed by Archbishop *Roland*, of which the enrolment is lodged in the Rolls' Office, is offered in evidence. This document purports to be a confirmation of a grant from *Maurianus*, of which it contains an *Inspeximus* ; from the *Inspeximus* it appears that this grant was from *Maurianus*, of the soil of the city, and of a certain right of pasture. The Archbishop, his successor, by an instrument upon record, confirms the grant of his predecessor, with the same reservations as in the original grant, and amongst others, one of a rent of nine marks per annum, which, it is alleged, has never been paid. It is contended, that this does not constitute legal evidence of the grant from *Maurianus*. The proper searches, however, for the original of that grant have been proved, and the question is, whether a grant by one Archbishop, reciting a grant by his predecessor, which he confirms, is evidence of that grant ? The whole fee was in *Maurianus* ; the grant could not have been made without the concurrence of the Dean and Chapter ; their consent is alleged, and the proper solemnities are stated. I am disposed to think that this is good secondary evidence of the predecessor's grant. If the original of *Roland's* charter was here, I should consider it good evidence of the former charter.



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But then, it is said, this enrolment is not itself admissible as evidence of the second charter. No doubt, strictly speaking, it is not evidence as a record; but when the immense power of Archbishops in ancient times is considered, no one can feel surprised at the place in which it is found, and although the Rolls' Office is not the proper custody, still the instrument is not the worse for being found there. A draft of a deed, even instructions for the preparation of a deed, may be received as secondary evidence of the contents of that deed. I think this enrolment, which was deposited centuries ago in a place of security, where there was an officer, whose especial duty it was to take care of documents lodged in the office, is proper secondary evidence.

But a third difficulty has been suggested to my reception of this evidence, namely, that if the deed itself was held to be inadmissible in evidence, as against the Defendants, because no connexion is shewn to have existed between this grant and the Corporation; that there is not a proof that the deed was ever acted on by the Corporation, and that it is now tendered in evidence against an adverse party, who altogether denies claim under it. But how does this matter really stand? The soil of the city is distinctly proved to have been vested in *Maurianus*; the subject of the party is to shew how the property passed into the hands of the Corporation, out of the Archbishop. The parties claiming under the Corporation do not pretend to explain the matter; they merely say, we claim the property not under the Archbishop's grant. Is there then nothing to connect the Defendants with that deed? It is true that the payment of rent under it has been proved, but the property which was in the Archbishop is now found vested in the Defendants; they can only have got it through the Arch-

bishop. If, therefore, there is secondary evidence of a grant by the Archbishop, must I not connect the Defendants with that grant? It is the only title which has been produced.

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But the case does not rest there; the grant by *Roland* appears to have been produced at a trial, and acted upon by a verdict. And then there is the oath of the Mayor, not to alienate this property, which is described precisely as in the original grant. In the case of *Lancum v. Lovell(a)*, the grant was *from*, and not, as here, *to* a Corporation.

In stating these considerations, I have satisfied my own mind upon the point. I now entertain no doubt, and admit the evidence absolutely.

The part of this *Inspecimus* which related to the grant of pasture was in the following terms: "Likewise, we have also given, &c. to the said Provost and Burgesses who now are, and who for the time shall be, for ever, free pasture for all and every of the animals of them and their tenants whomsoever, and of all persons inhabiting and sojourning in the said town and the burgage thereof, in all our lands, except meadows, standing corn lands, and manors:" the charter did not grant any land except the soil of the city itself.

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The charter of the 15th of Charles I. was also read. In addition to the contents already mentioned, as stated in

(a) 6 Carr. & P. 437.

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the information, this charter contained grants of certain privileges to hold courts leet and courts baron, and various fairs and markets, and declared that the mayor, aldermen &c. and their successors should "have and perceive their own proper use all and singular perquisites, profits, commodities and emoluments, tolls, customs, and other profits, &c. issuing, &c. out of or in such fairs and courts."

Some extracts from the books of the Corporation were also read in evidence, to shew the application of the funds of the Corporation, until the year 1741, to the benefit of the town of Cashel. The latest entry, which was in the year 1741, was of a fee of 10*l.* paid to a physician for attending the sick poor of Cashel.

No evidence was offered of payment at any period of the rents reserved in the charter of Archbishop *Maurice*. An extract from The Down Survey was read, which it appeared that at the time that survey was made the Cottyn was common land; and also some old leases were put in, which shewed the practice of the Corporation to let their land for long terms of years at nominal rents.

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*Argument.* The *Attorney-General*, Mr. Serjeant *Greene*, Mr. *nahan*, and Mr. *Hanna*, for the information.

This lease is fraudulent, for it was made at a gross undervalue, and the lessors were mere trustees, being seized of the demised premises for the benefit of the citizens of Cashel, upon the trusts expressed in the charter of *Maurice*. A clear title cannot be shewn by any party, and a strong presumption, in the absence of all proof, arises,

the Corporation derive under the charter of *Maurianus*. The rent reserved by that instrument has certainly not been rendered for a long period ; after such a lapse of time, this discontinuance of payment must be attributed to a conveyance of the land itself, for the pasturage of which, while the land was the property of another, the rent was reserved. Now as the Corporation, beyond all question, were fettered with a trust for the inhabitants of Cashel, in their seisin of the right of pasturage, so when for that right the lands themselves were substituted, it must be presumed that a new but similar trust was also substituted. The oath of office prescribed to the Mayor by the charter of Charles I. fortifies this presumption. It is true, this lease is not an alienation of the inheritance ; but will a Court of Equity allow such an evasion ? The Crown would never have imposed such an oath, had there not been a trust.

As to the parties interested under the settlement of 1835, that settlement was executed *pendente lite*, and *William Pennefather* was a party to the entire transaction.

Mr. Serjeant *Warren*, Mr. *Moore*, Mr. *Brewster*, Mr. *Dickson*, and Mr. *Mansergh*, for the Defendant, *William Pennefather*.

The question is simply whether the lands comprised in the lease of 1830 were affected with a trust in the hands of the Corporation. The information describes the Corporation as existing from time immemorial : it is submitted that their seisin of Cottyn was coeval, and must also be referred to time immemorial. No land, except the soil of the city, was comprised either in the grant of Henry III. to *Maurianus*, or that of *Maurianus* to the Corporation.

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There is no evidence whatsoever to shew that the Cottyn was ever the property of the Archbishop: there is none, that it was the land over which he granted, or assumed to grant, a right of commonage; every presumption is the other way. These have been ever, as it appears from The Down Survey, open and common lands; and the exception in *Maurianus'* grant of corn lands and meadows (which are not found upon commons) shews clearly that the land, over which this right of pasturage was granted, did not comprise the Cottyn; *Sheppard's Touchstone*(a). The rents, in respect of the pasturage and the hundred, were reserved distinctly. How is the non-payment of the one mark accounted for? Is it to be necessarily assumed, from the entries of expenditure read from the corporation-book, that that expenditure was made by compulsion? The oath contains two prohibitions; the first not to alien the inheritance. It is very questionable whether this restriction bound the Corporation in point of law, *Sutton's case*(b). The King cannot make a gift of property to be held without a power of alienation. The second prohibition was not to assign rents then or thereafter issuing out of the Cottyn: the oath, therefore, assumed that the Corporation might demise the land. The tolls are granted to the proper use of the Corporation. Is it not more probable that the Crown would clothe with a trust this new grant, rather than the land already the property of the corporation?

[THE LORD CHANCELLOR:—Suppose the lands were derived from some other source, unfettered with any trust, and that the Corporation accepted this charter of Charles, can it be argued that the restrictions of the oath are not binding?

(a) Page 96.

(b) 10 Rep. 23 (a).

It certainly cannot; but the construction and effect of the oath are relied on. Its object was the preservation of the property of the Corporation in the Corporation, for the benefit of its own members. If a trust existed antecedently to this charter, *cui bono* the oath? Would not the strong arm of this Court be a far more effectual restraint than the sanction of a mere oath? Although this Court has jurisdiction in cases of trust and charity, yet, unless a trust is clearly established, this Court cannot interfere merely on the ground of a misapplication of their own funds by the Corporation; *The Attorney-General v. The Corporation of Carmarthen*(a). Here, if there be not a trust, the utmost that can be said of the lease is, that it was a misapplication of Corporation property. *The Mayor of Colchester v. Lowten*(b) is to the same effect.

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Mr. *Doheny* and Mr. *Hughes*, for other parties.

Mr. *Monahan* in reply.

THE LORD CHANCELLOR :—

This case has been fully argued, but I do not mean to dispose finally of it at present. It may be a question of some difficulty to determine whether this property was comprised in the grant from Archbishop *Maurianus* to the Corporation of Cashel; but looking at the original grant from the Crown to *Maurianus*, I do not know that I may not suppose that the commons, which probably were of inconsiderable value at the time, were included in it. It might not be difficult to hold, that under the grant of the

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"town with its appurtenances," these commons, which immediately adjoined the town, would pass. But, however the Archbishop may have acquired lands in this place, it is clearly proved that he granted the town to the Corporation, and also free pasturage over all his lands. I think the fair construction of this is, what has been suggested, that the Corporation were to enjoy free pasturage over all his lands, which from time to time should remain in pasturage, but that the Archbishop was not to be restricted in treating the lands as he chose. The proofs which have been read do not shew what the lands were, over which this right of pasturage was to be enjoyed, or that this right was ever enjoyed. There is not any positive proof that the lands in question did in fact ever belong to the See; neither is there any proof of payment of the reserved rents, of the one mark, or of the nine marks; but the inference attempted to be drawn from the want of proof of such payment is clearly carried too far, for there is property, which the Corporation at present enjoys, for instance, the franchise, &c., in respect of which rents were also reserved, yet it does not appear that those rents have ever been paid. This observation, therefore, removes the effect of the argument derived from the circumstance of the non-payment of rent.

By the Down Survey, which was made in 1666, it appears that these lands were then called the Commons of Cashel, and also by an Irish name, which, as it has been explained to me, means Commons. Now this goes to prove that this was common land, and as we all know how lands became common, it is not probable that any other person than the Crown or the Archbishop, or some other great lord, could have had the soil of these lands; and

no other person seems to have intervened here, there is a strong presumption that these lands belonged to the lord of the soil of the town, at the gates of which they lay. Now before the charter of Charles, the Corporation were in possession of the commons of Cashel. It is then said, and with some appearance of reason, that the Corporation being found in possession of the land as their own soil, and having had pasturage granted to them over the lands adjoining the town, it must be considered as pasturage, which would be useful to the inhabitants of the town, and that in the absence of evidence of any other property being enjoyed by the Corporation, it must be presumed that these commons were the property, the right of pasturage over which was granted by the Archbishop. Supposing then the fair presumption to be, that the lands in question in this cause are those, over which the right of pasturage was granted, what is the rule of law? Clearly this, that if a trust attached to the right of pasturage in the hands of the Corporation, in lieu of which right the soil of the lands has in some manner been substituted, those, who would have been entitled to participate in the benefit of the former trust, will now be entitled to share in the advantages of that, which has, by substitution, become liable to the trust. For what is the right of pasturage over certain lands? It is the right of eating, by the mouths of your cattle, the produce of those lands; the gift of the land itself merely confers an additional and more extended right over the same soil, which must be bound by the original trust. It is the same thing if the right to the lands was acquired by usurpation. In cases of encroachments made by tenants, the point has been decided different ways by different Judges. But I believe the better opinion to be, that if a tenant commits an encroachment, the landlord, on the expiration of the

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term, will be entitled to the benefit of the encroachment. It is certainly a strong measure to make the landlord trespasser by the act of his tenant ; but such, I apprehend, is the law. This principle, by analogy, supports my view of the law of this case.

But the case does not stop here. By the charter Charles, grants were made of fairs, markets, &c., to the Corporation, expressly for their own absolute use ; but certain restrictions were imposed, as to the mode of dealing with the commons. It was suggested, that there was no power to require this oath ; but Mr. Serjeant *Warren* admitted with that candour, which is always creditable to the counsel, and never injurious to the client, that acceptance of this charter rendered binding upon the Corporation the restriction of the oath, which it imposed. But then it was said, that the object of this oath was the benefit of the members of the Corporation *inter se*, and that as the *Attorney General* had no right to pry into the affairs of the Corporation, unless some trust attached to its property, the Court could not interfere on this information. But looking at the terms of this oath, and particularly in connexion with the frame of the charter, how can it be alleged that its object was to prevent alienation, merely with a view to the benefit of the Corporation itself ? If this had been the intention of the Crown, might we not have expected to find the restriction annexed to the property—the tolls and customs—which the Crown itself was granting ? The charter assumes this singular shape, that whilst the Crown for the first time, grants the tolls and customs, and might therefore, have imposed any restriction it thought proper on the mode of enjoyment of them, it yet places the restrictions on the mode of dealing with the commons, of which the Corporation were then in possession. It is true, there

not upon the face of the charter a word pointing expressly to a trust. On the other hand, what is the meaning of the oath? "You shall not consent to pass any estate of inheritance in mortgage, or otherwise, in the common lands of Cashel, called Cottyn." This is a clear prohibition against any alienation of the lands themselves. The oath then proceeds: "You shall not give any way, nor consent that any assignment shall be made of or for any rent, that now is, or hereafter shall be, issuing out of the said Cottyn." It is difficult to imagine a prohibition more clear, or more stringent, against any alienation of the beneficial interest in this property. It says, you are neither to alien the inheritance, nor any rent issuing out of the land. A restriction might be expressed in larger words, such as a conveyancer would probably use; but you could not frame any thing more explicit, or more stringent. What sense am I then to attach to this oath? Why was it annexed to the mode of dealing with the commons? Why was it not annexed to the new grant of the franchise? What could have been the reason of this distinction, unless it were, that there was an already existing liability affecting the lands, the former property of the Corporation? The meaning seems to be this; as to the new grant, the Crown did not wish to impose any restriction, but the Crown did mean to impose an oath to perform the corporate duties; not only the general duties, as members of a Corporation, but also those, which related to the lands intrusted to their care. Counsel have not attempted to explain the use of this oath, unless there was an antecedent trust. There is nothing to repel this presumption; therefore, if there was nothing more in the case, and I were to act the part both of Judge and jury, weighing the facts upon my oath, and applying to those facts the law, I should, upon the evidence which has been

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offered, be of opinion that the land, by way of substitution, was bound by a trust.

But there is no evidence to shew that this land ever belonged to Archbishop *Maurianus* ; it rests wholly upon presumption : neither is there any statement of what the amount of the property of the Corporation was, or how it was disposed of, for what purposes, at any given period. What I am disposed to do is this, if the Defendants desire it, I will direct an issue to inquire, whether the lands called the commons of Cashel were the lands, over which the right of pasturage was granted. I do not press the Defendants to take this issue ; and their counsel should be aware of what, upon the return of the inquiry, my ultimate decision would probably be. If the issue is found in favour of the Defendants, they will then have only to deal with the difficulties arising from the charter of Charles the First ; but if the issue is found the other way, there will be at once a decree against them. Supposing the lands not to have been the lands of the Archbishop, the question will then arise, whether the charter of Charles did not bind them with something in the nature of a charitable trust, which the oath did not define, because it previously existed.

Upon the last point in the case, it is scarcely necessary to observe, that if the lands were affected by a charitable trust, this lease must be set aside. The right of the wife cannot rest upon a better foundation than that of her husband, for the settlement, by which the jointure was charged upon these lands, was made *pendente lite*.

The Defendants elected to take an issue, which ~~was~~ accordingly directed.

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A feigned action was thereupon brought in the Court of Common Pleas, and two issues were raised ; the first, whether the lands mentioned in the pleadings, and comprised in the lease of the 13th of September, 1830, were those, over which a right of pasturage had been granted by Archbishop *Maurianus*, or any part thereof ; and secondly, if not so, whether the said lands came to the Corporation in lieu of those, over which the right of pasture had been granted. The action was tried before the Lord Chief Justice of the Common Pleas, in the month of December, 1842, and the jury found a verdict in the affirmative on the first issue.

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THE  
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Statement.

The case now came on to heard upon the finding of the jury, and the only questions to be disposed of related to the period, from which the amount of mesne rates was to be directed against the Defendant, Mr. *Pennefather*, and the costs of the cause.

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January 19.

The *Attorney-General* and Mr. Serjeant *Stock* appeared for the relators.

Mr. Serjeant *Warren* and Mr. *Moore* for the Defendant, Mr. *Pennefather*.

THE LORD CHANCELLOR :—

I have been furnished with a note of my judgment on the former hearing, and I find that I not only thought, as has been established by the verdict of the jury, that the lands included in the lease were part of the lands, over which the right of pasture extended, but that independently of that, the restrictions imposed by the charter of Charles the First,

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led to the irresistible inference, that the property in question was subject to certain trusts, and that the right of the *Attorney-General* would be established; and so it has turned out.

The questions now before me are, first, as to the time from which the account of mesne rates is to be directed, and, secondly, the costs of the suit. The lease in question was executed in the year 1830, to Mr. *Pennefather*, before the old lease had expired, and just after the Mayor had taken the oath, which bound him, at least with respect to these lands, and ought to have led to an inquiry, the result of which must have been the discovery of the documents, which would have shewn a dedication of the land to the benefit of the town.

I do not dispute, that if this were mere corporate property the *Attorney-General* would have had no right to have filed the present information, or instituted any inquiry into the mode of its management. Still it never could be said that the application, which has taken place in the present case, was a proper one. Corporate property should be applied to the purposes of the Corporation. In a moral point of view, no doubt, there is a very good excuse for the misappropriation of this property, arising from the long established custom of granting such leases to private persons. But this is a consideration with which I have nothing to do at present, for it now turns out, that this property is dedicated to charitable purposes; the Mayor, who was bound by the oath to which I referred on the former occasion, is the person who obtains the lease, and in the year 1832, within two years after the commencement of the lease the present information was filed. I am asked not to car-

the account farther back than the filing of the amended information in 1837, first upon the merits, and secondly, upon the frame of the proceedings. As to merits, I cannot discover any; this gentleman paid nothing for his lease; he took it for his own private purposes; both at the hearing in this Court, and before the Jury in the Court of Law, he insisted upon his own title, and resisted the right of the *Attorney-General*. The suit was an adverse one, and the Defendant's case throughout was, that he had done nothing wrong. The very contest shews the honesty of his defence. But the defence has failed. The rents and profits must go to the real owner. I am here to execute justice between the parties, and I cannot think it would be just to give to this gentleman what is the property of others.

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With respect to the frame of the proceedings, it was said that Mr. *Pennefather* was no party individually to the original information, that in fact it did not refer to him; the prayer of the original information was read, and it asks for an inquiry with respect to all leases, shewing distinctly that proceedings were at that time contemplated. How is it then possible to suppose, that the Defendant was not aware that his title would be impeached?

On the whole, then, I apprehend, that it is a matter of course to charge this Defendant with the rents and profits from the year 1830, the period of the commencement of the lease. It is true that this Court is always unwilling to direct an account for any great length of time; but that is only in cases, where the funds have been supposed to belong to the person holding them, or where, although the parties have acted erroneously, still their conduct has not

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 —  
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been corrupt. Speaking from recollection, I think Lord Eldon, in *The Attorney-General v. Mayor of Exeter* (c) laid down the principles which should govern the Court and upon which I shall always be ready to act.

Then as to the costs, the suit was rendered necessary by the misapplication of the trust fund. The documents, which proved the misapplication, were in the possession of the Corporation, of which the Defendant was a member. Who then ought to pay the costs? I cannot throw their payment upon the estate, which has been too long withheld from its rightful application. To do so, would be to hold out an encouragement to persons to retain estates, which do not belong to them. The costs must, therefore, abide the result of the suit. If the Defendant had succeeded, he would have been entitled to the costs of the suit. He has failed, and failing he must pay the costs. I must declare the lease to be an improper one, and direct it to be set aside. I must also direct an account from the commencement of the lease until the present time, with all just and fair allowances. The Defendant, Mr. Pennefather, must pay all the costs of the *Attorney-General* and the relators. The Corporation are to bear their own costs, and there must be a reference to the Master to approve of a scheme for the application of the rents of the estate.

MULHALLEN *v.* MARUM.

1843.

Jan. 16, 17, 18.

THE bill in this case was filed for the purpose of impeaching a lease of the 9th of April, 1829, granted by the Plaintiff, *Edward Mulhallen*, to one *Richard Marum*, since deceased. It appeared that the Plaintiff was entitled, under the will of his father, to the lands of Ballygurteen in the county Kilkenny, and by the said will and a codicil thereto, the testator appointed his wife, *Martha Mulhallen* and *John Robertson*, his executors and the guardians of the estate and person of the said Plaintiff, and thereby directed, that until the Plaintiff should attain the age of fourteen years, a sum not exceeding 100*l.*, and from the age of fourteen, a sum not exceeding 200*l.*, at the discretion of the said guardians, should be expended annually on his maintenance and education. It appeared that the Plaintiff was educated as a boarder at a public school, until he had attained the age of eighteen years, about which time, his sister *Elizabeth* (the principal Defendant), having intermarried with *Richard Marum*, he was placed by his guardians under the care of the said *Richard Marum* upon an allowance of 100*l.* per annum, and *Marum* was, at the same time, also appointed agent and receiver of the rents and profits of the lands of Ballygurteen.

A lease made to a person standing in the position of guardian, and at the same time filling the characters of agent, receiver, and tenant, directed to be set aside upon the equity arising out of these relations, and upon the ground of public policy ; and with costs, notwithstanding that a period of eleven years had elapsed after the granting of the lease before the institution of the suit.

The account, however, was limited to the filing of the bill by reason of the delay.

The Plaintiff attained his age on the 19th of August, 1828, and on the 27th of the same month, a memorandum of agreement was entered into between the Plaintiff and *Marum*, and signed, whereby the Plaintiff agreed to grant unto *Richard Marum* a lease for ever of the entire of the said lands, containing about 730 acres, and all the timber and trees then growing, or thereafter to grow, and all



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mines and quarries of coal, culm, marble, or of any other description thereon, at the yearly rent of 500*l.*, payable as therein mentioned; and it was by the said memorandum declared, that the Plaintiff, his heirs and assigns, should have the plantations on the said lands as a fox cover, free of rent, whenever he or they should think proper, and the Plaintiff thereby agreed to do all necessary proceedings in the law to enable him to make said lease.

By indenture of lease, bearing date the 9th of April, 1829, and made between the said Plaintiff, of the city of Kilkenny, of the one part, and the said *Richard Marum* of the other part, reciting the memorandum of the 27th of August, 1828, and a fine and recovery as of Hilary Term 1829, and that instead of a lease for ever, it was agreed that the Plaintiff should execute to *Marum*, a lease for three lives with covenant for the perpetual renewal thereof the said Plaintiff granted unto the said *Richard Marum*, his heirs and assigns, the said lands, and all timber trees and all mines and quarries of coal, culm, &c., to hold the same for the lives of the Plaintiff, and *Edward Marum* and *Augustine Marum*, two of the children of the said *Richard Marum*, and for the life and lives of such other person and persons, as by virtue of the covenant for renewal therein contained, should for ever thereafter be added thereto, subject to the yearly rent of 500*l.* sterling, payable as therein and the said indenture contained a proviso for enabling the Plaintiff to hunt and sport over the said lands, and a covenant for the preservation of the fox covers thereon.

By indenture bearing equal date with the lease, made between the Plaintiff of the first part, *Richard Marum* and *Elizabeth* his wife, and *Anna Maria Mulhallen* (

other sister of the said Plaintiff), of the second part, and *John Robertson* and *Henry Gore* of the third part, reciting the memorandum of agreement of the 27th of August, 1828, and the lease of the 9th of April, 1829, and a certain fine and recovery as of the last Hilary Term, the said Plaintiff, with the consent of the said *Richard* and *Elizabeth Marum*, and *Anna Maria Mulhallen*, granted and released to the said *John Robertson* and *Henry Gore*, all the said lands, to hold the same, "subject to the said lease so made by the said Plaintiff to the said *Richard Marum* as aforesaid," upon the several trusts therein mentioned; that is to say, to permit the said *Martha Mulhallen* (Plaintiff's mother), to receive an annuity of 184*l.* 12*s.* 4*d.* for and during her natural life, and subject thereto to the use of the Plaintiff and his assigns, for and during his natural life, and from and after his decease, subject as aforesaid, and also to the further annuity of 100*l.* for the wife of the said Plaintiff, and a sum of 2000*l.* for younger children, in case the said Plaintiff should marry, to the use of the first and every other son or sons of the said Plaintiff, and for default of such issue, to the use of the daughters of the said Plaintiff in tail; with limitations over in default of such issue, to the said *Elizabeth Marum* and *Anna Maria Mulhallen*, with an ultimate limitation in favour of the said Plaintiff, his heirs and assigns for ever. This deed also provided, that in case the said lease of April, 1829, should fail to be renewed, or by any other ways or means should cease, that the said Plaintiff and the said *Elizabeth Marum* and *Anna Maria Mulhallen*, as they should be respectively in possession, should have power to make leases of said lands for any term not exceeding three lives or thirty-one years, and upon the usual conditions.

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Upon the execution of the lease, *Richard Marum* went into possession, and continued to work the mines and collieries. Shortly afterwards in the month of July in the same year, an account, for the first time, was furnished on the part of *Richard Marum*, on foot of his receipts, as agent for the Plaintiff, by which account a balance of 232*l.* 5*s.* 6*d.* was brought in against the Plaintiff, over and above all credits. At the period of furnishing this account, the bill stated, that *Richard Marum* represented to the Plaintiff, that the sum of 100*l.*, which had been allowed for his maintenance and education during his minority, had not been a sufficient compensation for his support, and that he, the Plaintiff, was bound to secure him in a sum of 400*l.*, to make up such deficiency ; and that he resorted to threats of annoyance, as the bill charged, and promises of kind acts and accommodation, in order to enforce a compliance with his wishes ; that in the result, the Plaintiff was prevailed upon to pass to the said *Richard Marum* his bond for the said two sums of 232*l.* 5*s.* 6*d.* and 400*l.*, with warrant of attorney for confessing judgment thereon, upon which judgment was duly entered up as of Trinity Term, 1829.

*Richard Marum* died on the 26th of July, 1832, intestate, leaving *Edward Mulhallen Marum*, his eldest son and heir at law, a minor, him surviving. Shortly after the decease of *Richard Marum*, his widow, *Elizabeth Marum*, obtained letters of administration to him, and she and her son, *Edward M. Marum*, entered into possession under the said lease of the 9th of April, 1829.

In the year 1831, the Plaintiff intermarried with his present wife ; and on the occasion of that marriage, a set-

tlement of the 13th of June, 1831, was executed, reciting the deed of settlement of the 9th of April, 1829, and limiting the estate upon the issue of the marriage.

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The bill stated all the above facts, and charged that the lease in question was obtained by *Richard Marum* by fraud, and by means of the undue influence and power which he had acquired over the Plaintiff during his minority, which he had obtained and exercised by advancing money for horses, and other expenditures for the Plaintiff's amusements ; that when the contract of the 27th of August, 1828, was procured, the Plaintiff had just attained his age of twenty-one years ; that he had been kept in ignorance of his rights, and the value of his property. The bill further charged, that the rent reserved by the said lease was not the true value of the lands, exclusive of and without the collieries, independently of which, they would have produced an annual rent of 600*l.* ; and that inasmuch as the said lease had been obtained by an agent from his principal, at an under value, it could not be supported in a Court of Equity.

The bill also charged, that the deed of the 9th of April, 1829, declaring the uses of the fine and recovery, and that the said lease was valid, had been obtained under similar circumstances, and ought to be set aside, so far as it purported to confirm said lease.

The bill also charged, that as evidence of the inexperience of the Plaintiff, and the influence and control which the said *Richard Marum* exercised over him, that, shortly after the execution of the lease of the 9th of April, 1829, the Plaintiff was prevailed upon to execute a contract, by which he undertook to reside with *Marum*, and to allocate

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the said rent of 500*l.* in the following manner, that is to say, 150*l.* for the keep of three horses, 139*l.* 4*s.* 7*d.* for the Plaintiff's maintenance, and 100*l.* for pocket money.

The bill prayed, that the lease of the 9th of April, 1829, might be cancelled; and that the said indenture of the 9th of April, 1829, might be set aside, so far as the same recognized the validity of the said lease; that it might be referred to the Master to inquire and report what was the true annual value of the said lands, and said mines and collieries, and what annual rent could have been procured therefor from a solvent tenant; and also to take an account of what was due to the Plaintiff on foot of the real and true value of said lands, and mines, and collieries; and what sum had been received thereout, or, but for wilful default, might have been received thereout by the said Richard Marum, and Elizabeth and Edward M. Marum respectively; and that Plaintiff should be paid such sum as should be found to be due, upon the taking of such account, after all just and fair allowances; that an account might be taken of the sum really due to the said Richard Marum, on foot of the said bond, having regard to the consideration thereof; and that, if necessary, an account of the sum really due on foot of the accounts, upon which the alleged balance of 232*l.* 5*s.* 6*d.* was struck; and that the said judgment so obtained against the said Plaintiff might stand as a security for such sum, if any, as should be found due by the said Plaintiff on the taking of such account; and that the Defendant, Elizabeth Marum, might be restrained from taking any proceedings at law, upon foot of said judgment.

The bill was not filed until the latter end of the year

1841. In excuse for this delay, the Plaintiff stated, that he continued to reside with *Richard Marum* until the beginning of the year 1831; that at that period, and for some years subsequently, he was regardless of money matters, and all affairs of business, owing to the course of life he had adopted, while under the influence of *Richard Marum*; that his papers and vouchers were in the possession of his mother, and that he had had no access thereto until the year 1837.

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The Defendants, *Elizabeth Marum*, and her son *Edward Marum*, answered the bill jointly. They denied that *Richard Marum* had exercised any undue influence over the Plaintiff, and insisted upon the perfect fairness of the transaction; that the contract had been commenced and carried on with the full knowledge, at the desire, and by the wishes of the Plaintiff's guardians; one of whom, *Robertson*, was a man of experience and general information, and a sincere friend of the Plaintiff; that the Plaintiff had sought the professional assistance and advice of Mr. *Charles Denroache*, a highly respectable attorney, and the confidential solicitor of the Plaintiff and his family, and who had never in any manner acted as the attorney or agent of *Marum*, save on the occasion of preparing the lease in question. They denied that the lease was made at an under value, but that, on the contrary, the rent reserved by the said lease was the fair value; and they submitted that, considering the lawless character of the tenantry, and the difficulty and expense attendant upon collecting the rents from a number of poor and distressed tenants, compared with the advantage of having but one solvent tenant, the arrangement was a most desirable one for the Plaintiff; that *Denroache* had been the agent and receiver of the rents of

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these very lands, prior to the appointment of *Marum*, and must, therefore, have been acquainted with their value. The Defendants also relied on the fact of an expenditure, on the part of *Richard Marum*, and these Defendants since his decease, to the amount of nearly 5000*l.*, in working the mines, and in improving the quality and condition of the lands, and in building and planting trees thereon, without having received any intimation whatsoever of any desire or intention, on the part of the Plaintiff, to impeach the lease.

The Defendants also sought to establish a case of confirmation, on the part of the Plaintiff, arising out of the Plaintiff's marriage settlement of the 13th of June, 1831, and two letters (which will be found subsequently stated), one bearing date the 17th of November, 1840, and addressed by the Defendant, *Elizabeth Marum*, to the Plaintiff; and the other, his reply thereto, of the 20th of the same month.

The Defendants further stated, that the Plaintiff's mother and the said *John Robertson* were both dead, and that *Charles Denroache* had gone to reside in the United States of America; that of all the parties engaged in the transaction, the Plaintiff himself was the only person remaining; and they submitted, that it was unjust and inequitable for the Plaintiff, after having lain by for a period of twelve years, without ever having taken any step to impeach the lease, now to institute the present suit, after the death, and in the absence of parties, who were alone fully cognizant of all the circumstances, under which the agreement and lease were executed, and could have given evidence of the fairness of the entire transaction; and they relied upon such acquiescence on his part, particularly after the deli-

berate ratification of the agreement, by the execution of the lease, and the subsequent confirmation of said lease by the settlement executed on the occasion of the Plaintiff's marriage.

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With respect to the additional charge of 400*l.*, which was included in the bond of the 15th of July, 1829, and as to which the bill sought relief, the point was conceded at the bar on the part of the Defendants.

The letters of the 17th and 20th of November, 1840, were as follows :

*“ Aharney, November 17, 1840.*

“ DEAR EDWARD,—You will be surprised to receive a letter from me, but when you read it, you will see that it is right I should mention what I heard, for many reasons. On this day a clergyman called to visit, and when but a short time with me, *Julia*, and *Sophia*, he said he wished to tell me that my brother was in the habit of speaking ill of me behind my back, and that his motive for telling me was, that I might take measures to secure myself against him. He then told me that you, not once, but often, told gentlemen, who boasts of possessing your confidence, that you were determined to try and break the lease or contract between you and *Richard* ; that you did not get what was the value of the place, and that even I attempted to throw the rent-charge on you. Though shocked at the moment, I at once said (though I could not doubt the word of a clergyman, and that of course you must have said something), that from the terms I was on with you, and the idea I had of your honour, honesty, &c., I would not believe you ever uttered such slanders, or such untruths,



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unless you were tipsy ; and that even were you capable of such unprincipled conduct, that with regard to the first part (the lease), there were too many proofs of the justness of the contract, too many witnesses of the poverty of the place, until *Richard* improved and made a property of it, to make me fear, as that you would be immediately thrown overboard. And regarding the rent-charge, I said you were incapable of telling such a base lie ; that it was from you I first heard of it, the clergyman not knowing that I had a lease for ever, or who to apply to ; and if I defended myself against him, it was not throwing it on you ; and also that when my son would shortly come of age, should he wish for a profession, and sell out the place, you would find in a hurry how very differently you would be paid, if paid at all. Now something you must have said ; and perhaps it was taken wrong, for I could not doubt my most respectable authority. Believe me, it has lessened you much, and will, for you cannot blame me to go every length to clear poor *Richard* (as it is not the first time he was spoken of), and to shew to friends and enemies that the lease you made him was with the approbation of your mother, family, and friends ; carried on even by your own law agent, *Denroach*, and no take in. I trust, dear *Edward*, you or *Julia* will not be displeased at my writing to you of this, as I am determined to take every opportunity to make the truth known to Mr. *Hutton*, and all with whom I am connected and I wish to apprize you first, lest some other might tell you I was speaking of your affairs, without knowing my motive was to clear *Richard*. But what is passed cannot be helped ; you cannot repair the injury you have done, so do not mind it more, than to tell Aunt *Augustine* you received this. I will direct to Mr. *Hutton*. I forget your number. I was sorry the children heard all this, but it

was told before them. I hope you are now quite recovered, and *Julia* well, and that you will believe me

“Your’s, as ever,

“ELIZABETH M. MARUM.”

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“*Dublin, 59 Abbey-street,*

“*Nov. 20, 1840.*

“MY DEAR ELIZA,—In reply to your letter of yesterday, I have only to regret that any thing should occur to mar the harmony that existed between us. With regard to the charges you have brought against me, I can only say they are a tissue of falsehoods. I can say no more until you let me know who is this very exemplary clergyman, who took such an interest in our affairs. As I have been accused, I require, in justice to myself, that you name your author; then (and not till then) I will afford you every satisfaction, and refute his charge. Neither *Julia* nor I could blame you for any thing you wrote, when your feelings were so excited, as they appear to have been. If the individual, who informed you, should refuse to give his name, it must have been, of course, a malicious act. At best, it is a most uncharitable one on his part. I will expect to hear in a post or two.

“Believe me your’s, as ever,

“E. MULHALLEN.”

The result of the evidence, as to the value of the lands, and the other points of the case, will be found fully stated in the judgment of the Lord Chancellor.

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Mr. Serjeant *Warren*, Mr. *Monahan*, and Mr. *H. G. Hughes*, for the Plaintiffs.

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The *Attorney-General*, Mr. Moore, and Mr. William Smith, for the Defendant, *Elizabeth Marum*, and her son, *Edward M. Marum*.

*Judgment.*

THE LORD CHANCELLOR:—

Jan. 18.

In this case two questions were made ; one, whether a sum of 400*l.*, charged by Mr. *Marum* to Mr. *Mulhallen* shortly after he was twenty-one, for four years' additional maintenance during his minority, could be sustained as a charge? Second, whether the lease for lives renewable for ever ought to be set aside? The first question was properly given up at the bar, on the part of the Defendants, and therefore the 400*l.* must be deducted in account from the sum secured by the bond and judgment, and the costs of so much of the suit as related to that sum must be paid by the Defendants to the Plaintiff. It remains for me to dispose of the second question.

Mr. *Marum* married a sister of the Plaintiff, whilst the latter was at school. In 1825, when the Plaintiff was eighteen years of age, he left school, and was placed by his guardian with Mr. *Marum*, at 100*l.* a-year. Mr. *Marum* had previously been appointed receiver and agent of the property, and had rented a newly discovered culm and coal mine at 50*l.* per annum. From the time the Plaintiff went to reside with Mr. *Marum*, his studies were wholly discontinued, and he addicted himself to hunting and coursing not simply with the approbation of Mr. *Marum*, but with funds furnished by him for those purposes. The 400*l.*, which has been abandoned as a charge, was for the keep of the hunters, and a groom for this lad, during the last years of his minority. The accounts settled between him

and Mr. *Marum*, in 1829, after the majority, prove that large sums were expended for the Plaintiff by *Marum*, during the above period, beyond the 400*l.*, and also over and above the 100*l.* allowed by the guardians, and regularly charged in the account; and there is no evidence to show that they were aware of those extraordinary advances. They imposed on the Plaintiff the necessity of starting in life with a debt, secured to *Marum* by a judgment, which exceeded a whole year's income.

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Now Mr. *Marum* was in effect the Plaintiff's agent, and receiver and tenant, as well as his brother-in-law, and he was delegated by the guardians to fill their place. The minor was placed under his care, with an allowance for his support. *Marum* was lessee of the newly discovered mine, and also receiver; and it does not appear that any other person was aware of the value of the mine. This power over the minor's property, and his knowledge of its value, are obvious; he had manifestly obtained an influence over the minor himself, by improperly lending himself to his sports, and allowing him prematurely to play the man. If he had had some personal object to gain, for which he was prepared to sacrifice the true interests of the minor, this is probably the foundation which he would have laid. He had little to fear from the guardians, who appear not to have watched over the most dangerous part of their ward's minority, but to have left him to the uncontrolled management of Mr. *Marum*. The result which we have heard is a surprise to no one. The young man's thoughts and time were wholly absorbed in sporting, and the care of his horses. He refused to see the tenants, alleging that he knew nothing of business. He remained, after his majority, under the roof of Mr. *Marum*.

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The Plaintiff was entitled to a clear estate tail in the lands in question, under an appointment by his father's will, with remainder to his two sisters, of whom Mr. *Marum's* wife was one. It would be absurd to say that the Plaintiff knew more of his title, than that he derived the estate under his father.

Now the ground being thus prepared, a few days after the Plaintiff attained twenty-one, an agreement was signed by Mr. *Marum* and him, by which he agreed to lease to Mr. *Marum*, for ever, the whole estate, and all mines, for 500*l.* a-year, and to do all acts to enable him to grant the lease. This agreement is very defective; it does not provide for the payment, by the lessee, of the quarterly rent, taxes, &c., although the lease itself shews that to have been the intention. There was a family solicitor, but who was more likely to be directed by Mr. *Marum*, as one of the family, than to be influenced by a determination to oppose him, and protect the Plaintiff. There is not the slightest proof that this important arrangement, which was to bind the property for ever, was fairly submitted to the other friends of the Plaintiff; he himself was, of course, wholly incompetent to form any judgment upon the act, and at the moment of his emancipation was, no doubt, too much engrossed with his pleasures, to bear any interruption. This agreement was followed by an agreement in 1829, by which the 500*l.* a-year rent was, after payment of the charge on the estate, appropriated to pay for the keep by Mr. *Marum*, for the Plaintiff, of three hunters, 50*l.* each; for the Plaintiff, to be paid him in the course of the year, 100*l.*; and 139*l.* and a fraction for the board of himself and groom. In this way the income was absorbed; and the accounts shew that the 100*l.* a-year was doled out to the

Plaintiff in shillings and pounds, so that he was completely under Mr. *Marum's* control. It thus appears that the Plaintiff's desire to lead a sportman's life rendered the 500*l.* a year indispensable to him, and the allowances, to which I have referred, exhausted the precise amount. Is it then possible to doubt that the Plaintiff was wholly in the power of Mr. *Marum*, and that he was as provident as the former was improvident? Did any prudent guardian or relation ever advise his ward or relative, immediately upon coming of age, with a love of country sports, which would probably lead him to reside in the country, to divest himself of his interest in his property, and to become what is here termed a mere rent-charger, with a due regard, no doubt, to the fox covers, but with none for the estate itself, which he received from his father? A mine of value had recently been discovered; others might be found, but still the whole was to be transferred to Mr. *Marum* for ever. There is not a paper produced, not the slightest evidence that *Marum* kept the Plaintiff in possession of the knowledge which he possessed in relation to the property. His acts shew that he would not have given the advice to his own son, which he gave to his wife's brother, for whom he was agent and receiver, and tenant, and whom he had placed with him for several years by his guardians.

As to value, at the time of the agreement, the estate and mines were at least worth the rent; and if I were to credit some of the witnesses, the mines produced several hundreds a year; it appears to me that the produce was of considerable amount. It is clearly proved, that Mr. *Marum* greatly increased the rents, shortly after he became tenant; and this increase does not appear to me to be accounted for by either the amount, or the nature, of his expenditure. The value,

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that is, the annual rental, in recent years, is much increased. The mines are represented by the Defendants' witnesses, scientific men, to be of no value, and the poor's rate has, upon appeal, been lowered from 300*l.* a-year to 5*l.* But I have called in vain for evidence on the part of the Defendant, by whose clerks the rents and renders are regularly received, for the *actual* receipts; she knows, but does not think it right to disclose her knowledge. On the other hand, men who have taken pits, and worked the mines, give evidence of the returns, which shew, that the mines produce a considerable income, although a large expenditure may now be required for an extensive working. I am not much influenced by the question of value; my impression is, that the evidence on that head is in the Plaintiff's favour. The Defendants could have removed all doubt upon the subject, both at the period of the agreement in 1828, and the present time. I place no reliance on the evidence of the Plaintiff's witnesses, of *Marum's* declarations about the Plaintiff, or of his having had an offer of 500*l.* a-year for the mines.

After the agreement was executed, a case was laid before counsel, without any intimation of any dispute in the family about their rights, but stating the agreement for the lease, and that the Plaintiff was desirous to grant it, if he could; and that he was further desirous of entailing the estate in the course, in which it would appear in his father's will to have been his desire it should be limited. The counsel, on account, as he stated, of the objectionable nature of the will, considered as an appointment, thought that the sister and Mr. *Marum* should join in the fine and recovery, to secure the lease, and subject thereto to the use of the Plaintiff, for such use, and with such remainders, as in the will.

There does not appear to me to have been any foundation for this doubt; and the counsel directed the estate to be re-limited to the old uses. All parties, however, joined in a fine and a recovery; but there is no evidence that any communication was made to the Plaintiff of this opinion, nor, indeed, is it shewn that he wished to resettle the estate.

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Two deeds were executed, a lease and a new settlement. Mr. Marum appears to have been apprehensive of taking a conveyance of the fee, subject to a rent, and, therefore, he was content with a lease for lives renewable for ever; but he might be influenced by the consideration, that the mine might fail, and that the day might arrive, when those, who claimed under him, might desire to be relieved from the estate. This variation, in effect, gave to the lessee all the benefits of a grant in fee, with a power of renunciation, whilst it bound the Plaintiff for ever, at the option of Marum. No particular mode of cultivation is prescribed, nor any management of the mines; the lease is in its terms an improvident one, and the Plaintiff was improperly made to covenant for quiet enjoyment, against all persons claiming paramount title to him.

The settlement, I consider, bears marks of fraud on the face of it. It recites that differences had arisen between the Plaintiff and the Marums, and the other sister, with respect to the construction of the deed, creating the power, and the will of the father, &c.; and that it was agreed, as well for the purpose of putting an end to that difference, and avoiding litigation, as to make the lease and settlement, that the estate tail should be barred. Now there is no trace of any such difference; this recital clearly refers to the



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point raised by the counsel, and which] was thus brought forward with a view to support the proposed lease and settlement. In the result, the Plaintiff is made tenant for life, with a small jointure to any widow, and power to charge portions ; with remainders to his sons in tail male ; remainders to his daughters in tail ; remainders to his sisters, and their families ; so that the daughters of the Plaintiff's sons, and their issue, are by this scheme wholly excluded, in favour of the collaterals, although the Plaintiff himself was tenant in tail general of the estate. This was a fraud upon the Plaintiff. This deed, anticipating that the lease for lives might not be renewed, gives a power of leasing, which is confined to three lives, or thirty-one years ; so that the parties do not appear to have approved of a perpetual, or, indeed, any right of renewal.

It was argued that the lease and the settlement were both confirmations, or at least recognitions of the agreement ; and the settlement of 1831, by the Plaintiff, on his marriage, was in like manner relied upon. Up to that period the Plaintiff was living under Mr. Marum's protection. I cannot consider any of these acts as amounting to a confirmation. An act, to amount to a confirmation of dealing, such as that in this case, must be made with knowledge of the right to impeach the transaction, and with an intention to confirm. I need hardly say, that in this case both these requisites are wanting. The very frame of the deed of 1829 satisfies me, that no professional protection was afforded to the Plaintiff ; and the character of the deed forbids me to treat it as a confirmation. I think that no weight is due to the circumstance, that Mr. Robertson, who had been one of the guardians, was a trustee under the settlement, and executed it. It is said that Mr. Marum is

dead, as well as the guardians, and that Mr. *Denroache* is in America. But the Defendant, when she wrote the letter of 1840, which has been so much relied upon, did not consider herself without sufficient proof; she said, that in regard to the lease, there were too many proofs of the justness of the contract—too many witnesses of the poverty of the place, until *Richard* improved, and made a property of it, to make her fear, as he (the Plaintiff) would be immediately thrown overboard. The Defendant is in possession of the accounts down to 1828; and it has not been shewn that she is not in possession of all the accounts since that period.

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I cannot hold the letters of 1840 to amount to a confirmation; it would be dangerous to convert the correspondence to such a purpose. The Defendant accuses her brother of speaking, behind her back, of her late husband's conduct in obtaining the lease, and that he meant to impeach it; and also of her conduct since; as to which latter charge, she tells him, she said he was incapable of telling such a lie. The answer, which was an immediate one, denies the truth of the charges, but neither expresses any approbation of the lease, nor an intention not to disturb it. It was disingenuous to write such a letter, if he then intended to impeach the lease; but it is possible that the letter itself first led him to make the attempt; and, at all events, his reply did not prevent him from filing this bill. I think that the case of *Lord Selsey v. Rhoades*(a) is not an authority to shew, that the acts in this case amounted to a confirmation.

(a) 2 Sim. & S. 41; 1 Bligh, 1.

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As to acquiescence, I do not think that it forms a bar in this case. The judgment, which included the 400*l.*, was hanging over the Plaintiff; and the relief, it is admitted, still remains as to that sum. The security was really a part of the transactions; and I think that the right to relief, as to the whole, is still existing. The circumstance of taking a judgment for that 400*l.*, behind the back of the guardians, bears strongly against the Defendants' case.

It remains only for me to declare the principles upon which I act. I have already pointed out the character which Mr. *Marum* filled. I consider him as standing in the place, by delegation, of the guardians; and I feel myself warranted in treating him, in regard to these transactions, as if he had been guardian. To this he added the relations of agent, receiver, and tenant. Upon the equity arising out of these relations, upon the ground of public policy, I think I am bound to set aside this lease. The doctrine upon which I act is fully laid down in *Hatch v. Hatch*(a), and *Huguenin v. Baseley*(b), which case was affirmed in the House of Lords, with 50*l.* costs, in May 1809, no counsel for the Appellant *Baseley* appearing. Upon the same ground, I must direct the Defendant to pay the costs, although I do not approve of the delay, nor of the reply in 1840. The Defendant is to be allowed for substantial and lasting improvements; for which purpose there must be a reference to the Master, and he must take the account between the parties, deducting the 400*l.* I shall give an account against the Defendant from the time of filing the bill, but not before, on account of the delay.

(a) 9 Ves. 292.

(b) 14 Ves. 273.

There should, however, be an inquiry as to the manner in which the mines have been worked, and their present condition; for if they have, with a view to undue profit, been recklessly worked, so as to leave them in a state unfit for working, without a great expenditure, I think that should be taken into consideration, in the proposed allowance for substantial improvements. If the Defendant waive this account, it will not be necessary to direct the inquiry. I cannot continue the injunction beyond a very short period. The Plaintiff, therefore, must be prepared to pay the balance ordered by the judgment, after deducting the 400*l*.

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Declare that the sum of 400*l*., part of the sum secured by the bond, bearing date the 15th of July, 1829, in the bill mentioned, is not to be allowed in the account as against the Plaintiff; and that the judgment is not to be enforced so far as regards that sum. Declare, having regard to the character filled by the late *Richard Marum*, and on the ground of public policy, that the lease bearing date the 15th of April, 1829, be set aside. And declare the Plaintiff entitled to the possession of the lands and premises, and the mines and royalties included therein; and an account of the rents, profits, and proceeds, received by the Defendant since the filing of the bill, is to be taken by the Master, and that the rent is to cease from the same period. Let an account also be taken of what is due for rent of the said lands, up to the time of filing the bill; and let the Master set an occupation rent, to be paid by Defendant, on such part of the said lands as were in her own possession, the balance to be paid according to the result, subject

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to the account hereafter directed. Master to take an account of all sums expended by the late *Richard Marum*, or by the Defendant *Elizabeth Marum*, before the filing of the bill, for substantial and lasting improvements; and let the Master ascertain what is the present value thereof. Let the Plaintiff be charged therewith in account, subject to the following directions. Master to inquire and report whether the mines have been worked in a workmanlike and proper manner or not, and what is the present state and condition of the same; liberty to the Master to state any special circumstances. Let the Defendant, *Elizabeth Marum*, pay all the costs of this suit, up to the hearing. The Plaintiff to pay the Defendants, *Henry Gore*, *William Robertson*, and *John Riordan*, their costs, and have them over against the Defendants. Plaintiff to be at liberty to deduct the costs found due to him from any balance due from him. Reserve payment of balance either way, and the consideration of subsequent costs, and all further directions, until after the Master shall have made his report.

*Reg. Lib. 87, fol. 68, 1843.*

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THIS case came before the Court upon exceptions to the Master's Report.

It appeared that by indenture of settlement, bearing date the 10th of December, 1783, and made between *John Watkins* of the first part, the Right Hon. *St. Leger* Lord Grenville and the Hon. *Mary St. Leger*, his daughter, of the second part, *Boyle Aldworth*, and the Hon. *Richard Leger*, of the third part, and the Hon. *Hayes St. Leger* and *Richard Aldworth* of the fourth part; and being the settlement executed on the occasion of the marriage of *John Watkins* with the Hon. *Mary St. Leger*, certain estates, situate in the county of Cork, of which the said *John Watkins* were seised, were vested in trustees for the term of five hundred years, upon trust, in the events which have happened, to raise a sum of 2000*l.* of the then currency, for the portions of the younger children of the marriage, to be divided amongst them in such parts and proportions, and to be paid at such time as the said *John Watkins*, by any writing under his hand and seal, or by his last will and testament, should direct or appoint: and in default of such appointment, to be equally divided between them, share and share alike, and to be paid at the times therein specified.

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By a marriage settlement, a sum of 2000*l.* was provided for the portions of the younger children of the marriage, to be divided amongst them in such proportions, as the father should, by deed or will, direct: and, in default of appointment, equally. The father, by his will, after reciting his power, bequeathed as follows: "I leave and bequeath unto my said daughter *Harriett* a further sum of 200*l.*, to have me properly buried in this island, and to pay what small debts I may owe in this island at my decease:—*Held*, that this appointment was bad, and that the 200*l.* should go as if unappointed.

There were issue of the marriage seven children; and at the marriage of one of them, *Harriett Charlotte*, and *James Hay* in the year 1821, *John Watkins*, by a writing under his hand, and attested by two witnesses, and bearing date the 1st of December, 1821, under-

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took, notwithstanding any deed or letter to the contrary, to leave at his death 500*l.* late currency, and during his life to pay the sum of 30*l.* annually, to the said *Harriett Charlotte Watkins*, as interest thereon.

On the 15th of August, 1833, *John Watkins*, who, up to the period of his death, had resided in the Isle of Man, departed this life, having previously made his will, bearing date the 4th of July, 1832, and thereby, after reciting the marriage settlement of the 10th of December, 1783, and the power of appointment which he had thereunder, he proceeded thus:—"Whereas on my daughter's (*Harriett's*) marriage with Captain *James Hay* I settled the sum of 500*l.* on her, to be paid at my death, and for which I have paid her the legal interest yearly: I further leave and bequeath unto my said daughter *Harriett* a further sum of 200*l.* to have me properly buried in this island, and to pay what small debts I may owe in this island at my decease: I also leave and bequeath unto my daughter, *Louisa Watkins*, the sum of 900*l.*, to whom I never gave any thing on her marriage, or since: the remaining 400*l.* I leave and bequeath unto my four sons in the East Indies, being amply provided for,—that is to say, 100*l.* to my son *John*, 100*l.* to my son *Arthur*, 100*l.* to my son *Westropp*, and 100*l.* to my son *William*."

The bill in the present cause was filed by *James Hay* and *Harriett Charlotte* his wife, and *Westropp Watkins* and *Louisa Watkins* his wife, praying that the appointment made by *John Watkins* in favour of his younger children, might be declared valid, and the charges raised.

On the 16th of December, 1841, a decretal order was

nounced, declaring the said sum of 2000*l.* to be well  
argued on the lands and premises in the pleadings men-  
ned, and referring it to the Master to inquire and report  
several parties then entitled thereto, and their rights,  
their several shares therein respectively.

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On the 19th of December, 1842, the Master made his Re-  
port, and thereby found that the Plaintiff, *Harriett Char-*  
*Hay*, was entitled to both sums of 500*l.* and 200*l.*

On this report exceptions were taken on the part of  
some of the younger children, who submitted that the  
appointment, so far as regarded the sum of 200*l.*, was  
void, and that this sum was therefore distributable as an  
appointed portion of the 2000*l.*

For *Mr. Moore* and *Mr. Joshua Clarke* for the exceptions.

Argument.

The appointment in this case is plainly void. It is not  
a case, where the appointment has been made with  
condition annexed, which the donee of the power had  
right to impose; for there the object of the condition  
some supposed advantage to the appointee: here, on  
contrary, the design is to benefit the party himself, and  
provide for the payment of his own debts and liabilities.  
The appointment, though nominally made to *Harriett*, is  
substantially in favour of the testator himself. It would  
be inequitable in *Harriett* to take the gift and refuse to  
perform the condition. Again, the gift and the condition  
are so blended together, that it would be impossible to  
separate one from the other. The cases shew, that the con-  
dition only can be rejected where the boundaries between



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the excess and proper execution are precise and apparent ;  
*Alexander v. Alexander(a)*, *Hamilton v. Royse(b)*. Here  
 the boundaries are not distinguishable, and the execution  
 therefore must fail altogether so far as regards this sum  
 of 200*l*.

Mr. Serjeant *Warren*, Mr. *Collins*, and Mr. *Radcliff*  
 for the Master's Report.

It is quite clear that the testator had no power to annex to the payment of the share, which he has thought proper to appoint, the condition in question : the condition therefore, is void, while, at the same time, the appointment is valid. The cases establish that where a condition is annexed to a gift, not authorized by the power, the gift is good, and the condition only inoperative, so that the appointee takes the fund absolutely, *Alexander v. Alexander(c)*, *Sadler v. Pratt(d)*. The Court always struggles to support the appointment, unless where there has been any underhand or fraudulent agreement, in which case the corrupt agreement vitiates the entire transaction, and renders it void *in toto*. In *Robinson v. Hardcastle(e)*, the donee of the power appointed by his will the estate charged with the payment of his debts, which he was not authorized to do ; and Mr. Justice *Buller* is reported to have said, " that this, perhaps, might render the whole execution of the power void." But in *The Treatise of Powers(f)* it is stated that there is no authority for this and " that even if the estate had been given to the object of the power, upon condition that he paid the donee's debts

(a) 2 Ves. sen. 640.

(b) 2 Sch. & L. 315.

(c) 2 Ves. sen. 640.

(d) 5 Sim. 632.

(e) 2 Term R. 241.

(f) Vol. ii. p. 92.

the appointment would have been good even at law, and the condition void : at any rate, in equity, the excess only in the appointment would be void."

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THE LORD CHANCELLOR:—

This case is not free from difficulty: what was intended **a**ppears to be quite clear. The object of the gift was not a mere bounty to the testator's daughter, but a something more, a payment of the testator's small debts. The cases go to this extent; that where the intention to benefit the object of the power is clear, and that something is superadded, a condition annexed to the gift not warranted by the power, there the gift is good; the Court will strike out what is excessive, and the appointee will take the fund absolutely: but, in this case, the benefit was intended to be given to the daughter, upon condition of her complying with the terms, which the donee of the power imposed, namely, the having him properly buried, and paying what small debts he might owe at his decease. Can it be argued, that it was intended that this lady was to take this sum of 200*l.*, and comply with neither of the conditions? That, however, may be said of every such case; but still further, here it is difficult to separate the gift from the condition, they constitute an entire gift: the words are, "I bequeath unto my daughter *Harriett* a further sum of 200*l.*, to have me properly buried in this island, and to pay what small debts I may owe in this island at my decease." It is like the case of a legacy, where there is no gift except in the direction to pay. I cannot separate the gift from the condition, and therefore must hold the appointment to be bad. I believe this to be the soundest construction, although I do not think the case free from difficulty. I allow the exceptions.

*Judgment.*

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By a decree of this Court, the Defendant was ordered to pay certain costs to the Plaintiffs: these costs were afterwards received from the Defendant by the Plaintiffs' solicitor, under a power of attorney from his clients. The Defendant then appealed from the decree, which was thereupon reversed, and the bill was eventually dismissed with costs. It was admitted that the amount of costs paid by the Defendant to the Plaintiff's solicitor was not paid over, but retained with the assent of the Plaintiffs, and applied in payment of the costs incurred in defence of the appeal, as well as of the other costs then due :—*Held*, that though there was no actual transfer of the money, yet that, in point of law, the payment to the principal was complete; and that the Defendant was therefore not entitled to an order upon the solicitor for the repayment of the amount of the costs.

THE bill in this cause had been filed for the purpose obtaining the renewal of a certain lease bearing date the 10th of November, 1783.

At the hearing of the cause on the 29th of May, 1840, a case was sent to the Court of Common Pleas for their opinion, whether the said lease, and the covenant for perpetual renewal therein, were warranted by the leasing power contained in a marriage settlement of the 26th June, 1781.

The judges of that Court having certified<sup>(a)</sup> that the lease and the covenant for renewal were warranted by the leasing power contained in the said settlement, the case was set down to be heard upon the certificate, and on the 2nd of June, 1840, a decree was pronounced in conformity therewith.

The Defendant, *Clarke*, having presented an appeal to the House of Lords, on the 5th of August, 1842, the House of Lords reversed the said order and decree, and directed that the Plaintiffs' bill should be dismissed with costs, the cause remitted back to the Court of Chancery, to do justice therein, as should be just and consistent with the said judgment.

The cause now came on to be heard upon this order.

(a) Smythe, 367.

the same time an application was made on the part of the Defendant, *Clarke*, that the Plaintiffs, and *John Smith*, their solicitor, might be ordered to pay back to the Defendant, *Clarke*, or his attorney, the sum of 237*l.* 1*s.* 1*d.*, being the amount of the several taxed bills of costs directed by the decree in this cause, bearing date the 2nd of June, 1840, to be paid by the said *John Clarke* to the Plaintiffs, and which the Plaintiffs' said solicitor compelled the said *John Clarke* to pay to him, under the threat of the process of this Honourable Court.

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In support of this motion an affidavit of the Defendant, *Clarke*, was read, from which it appeared that immediately after the pronouncing the decree of June, 1840, the Plaintiffs' solicitor furnished to the Defendant's solicitor the costs directed to be paid, and which costs were taxed to the sum of 237*l.* 1*s.* 1*d.*; and he pressed the Defendant for the payment of this sum, and threatened to enforce the payment thereof by means of the process of this Honourable Court; and that the Defendant, being apprehensive of the consequences in case of a refusal, paid the Plaintiffs' solicitor the said sum of 237*l.* 1*s.* 1*d.* upon the Plaintiffs' own receipt, and also the receipt of the Plaintiffs' solicitor, and, in addition, a power of attorney from the Plaintiffs to their solicitor, authorizing him to receive the same. The affidavit further stated, that on the 29th of July, 1840, the Defendant served on the Plaintiffs' solicitor notice of his intention to appeal, and on the 3rd of August presented his petition of appeal, and that on the 5th of August, 1842, the decree complained of was reversed: that he believed that the Plaintiffs were in embarrassed circumstances: that the amount of costs so paid to the Plaintiffs' solicitor had not been paid over to the Plaintiffs, but, on the contrary,

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had been retained by the solicitor; that an order on the Plaintiffs alone for the repayment of said costs would be ineffectual; and that unless the solicitor should be ordered to refund said costs, that same would be, in all probability, entirely lost to the Defendant.

The Plaintiffs' solicitor made an affidavit to resist the application. He admitted that he had received the amount of the costs from the Defendant *Clarke*, but added that the Defendant had refused to pay same unless the Plaintiffs' solicitor obtained a power of attorney from his clients, authorizing him to receive same, which he accordingly did: he further admitted that he did not pay over this amount to the Plaintiffs, but retained same, with the assent of the Plaintiffs, for the defence of the appeal, which, at the particular request of the Plaintiffs, he had undertaken to defend, and also in payment of costs then due to him: that the costs of the appeal exceeded the sum of 400*l.*, and that the costs of the suit were still due. The Plaintiffs' solicitor, by his affidavit, further stated, that he had proceeded with the appeal upon the strength of being allowed to retain the sum so received by him from the Defendant, and which he received on account of the Plaintiffs, and as their agent, and for them, and not for himself.

*Argument.*

Mr. Serjeant *Warren* and Mr. *Moore*, in support of the application, submitted that they were entitled to an order upon the solicitor for the repayment of this money, which it was admitted, had not been paid over to the client: that the solicitor was aware of the appeal, and must have known that in the event of its being successful he would be liable to be called upon to refund the amount, which had been so paid to him: that in this respect he resembled a stake—

holder, holding a sum of money for the party, who would be eventually entitled to it. They cited *Malone v. O'Connor*(a), where such an order had been obtained from Lord *Plunket* under precisely similar circumstances.

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Argument.

The *Attorney-General* and Mr. *J. A. Wall*, for the Plaintiffs' solicitor, distinguished the present case from that of *Malone v. O'Connor*, inasmuch as there the payment had been made to the solicitor in his character of solicitor, and upon his own receipt, whereas here the solicitor was acting not as solicitor but as the agent of the parties, under a power of attorney; in addition to which there had been in the present case an actual appropriation of the money so paid, for it had been applied, by the direction of the principal, in payment of the costs due to the solicitor.

THE LORD CHANCELLOR :—

Judgment.

This is an application on the part of a Defendant, in whose favour a decree of the House of Lords has been pronounced, reversing the decree of this Court, which, among other things, directed that the Defendant should pay the costs of the cause to the Plaintiff, and which costs were accordingly paid. I should be glad to be enabled to relieve the parties : the case is a hard one : for these costs, the Defendant's own money, have gone, in point of fact, to defend the appeal ; but still this has in a measure occurred through the Defendant's own fault, for he should have applied to the Court to stay the payment of these costs, upon an affidavit, stating that the appeal was *bonâ fide*,

(a) 2 Ir. Eq. R. 13.

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*Judgment.*

and not intended to delay the Plaintiffs: and had he made out this case, and deposited the costs, they would have been retained by the Court. He ought certainly to have availed himself of the protection, which the Court could then have afforded to him. The question now is one of principle: the affidavit states that the Defendant refused to pay the amount of these costs to the Plaintiffs' solicitor, unless he had a power of attorney from his client, authorizing him to receive the same. This was obtained; the payment, therefore, was, in fact, a payment to the principal, and not to the solicitor. It is said, that there was not any actual transfer of the money; that it never left the possession of the agent; but, in point of law, the payment to the principal was complete: and it appears by the affidavit of the solicitor, that he did retain this money with the assent of his client. The case is not like that of a stakeholder, to which it has been compared at the bar, for such a party receives the money as a deposit, and is not at liberty to give it to either party, until their respective rights have been established, like the common case of an auctioneer. The present case is widely different: but the parties have not adopted the right course, and I may not now attempt to effect justice at the expense of principle: I must, therefore, refuse this motion, but without costs.

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**T**HE Plaintiff in this cause was a creditor of one *Patrick James Joyce*, deceased, having accepted a bill of exchange for his accommodation, which he subsequently was obliged to pay. The bill was filed for the administration of the real and personal estate of *Joyce*. The Defendants were his widow, who was his personal representative, and his son, who was his heir at law.

Bill by a simple contract creditor against the widow (who was the personal representative), and the heir at law (who was a minor) of the deceased debtor. The personal representative having been examined in the cause on the part of the Plaintiff:—  
Held, that the Plaintiff might read her evidence at the hearing against the co-Defendant, the heir at law.

The son, who was a minor, answered jointly with the personal representative, as his guardian, and by this joint answer, they admitted that the bill was an accommodation one, and had been paid by the Plaintiff. The personal representative was examined in the cause, as to these facts, upon a consent signed, as well on behalf of the minor heir, as of the personal representative, and made a rule of Court, it appearing to be for the benefit of the minor.

Semle, it is not the rule of this Court, that an estate cannot be directed to be sold, until the cause comes back for further directions.

Under these circumstances the Plaintiff sought a decree against the personal representative, she consenting thereto, and also against the minor heir, and proposed to read, as evidence against the latter, the depositions of the personal representative.

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Mr. Baldwin and Mr. Holmes for the Plaintiff, cited, *Argument.*  
*Whately v. Smith(a), Carter v. Hawley(b), Mabank v.*

(a) 2 Dick. 650.

(b) Ambl. 583 (n).



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 Argument. Mr. Flood for the heir at law.

*Judgment.* THE LORD CHANCELLOR :—

I can see no objection, if a sole Defendant choose to consent that a decree shall be pronounced against him, why ~~he~~ should not be examined. But the difficulty which I feel is, that the Defendant here is not a sole Defendant, but is a co-Defendant with the heir at law, who is an infant; and then the question which arises is, can I pronounce a decree against the infant heir, upon a case proved by the co-Defendant. I do not know to what mischief this might lead. The counsel for the heir at law must look into the authorities, and argue the point on his behalf, and I shall allow the cause to stand over for that purpose.

*Jan. 26.* On this day Mr. Flood for the heir at law, stated, ~~that~~  
*Statement.* he was prepared to argue the question.

*Judgment.* THE LORD CHANCELLOR :—

I have been turning over the point in this case in ~~my~~ mind, and I do not think that there is any difficulty in ~~it.~~ The evidence of the co-Defendant may be read against ~~the~~ heir, and I will give liberty to exhibit an interrogatory ~~to~~ prove the will.

(a) 3 Atk. 95.

(b) 15 Ves. 178.

(c) 4 Russ. 114.

On the part of the minor, and for his protection, it was then proposed, that the decree should be drawn up according to the form in the case of *Baillie v. Jackson*(a), that the estate should not be sold, until the account of the personal estate had been taken, and the cause heard upon further directions.

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THE LORD CHANCELLOR:—

I will act upon that rule in this case, but I do not mean to say that I shall adopt it in any other. I should be very sorry to lay down the rule, that an estate was never to be sold, until the cause comes back for further directions.

The decree was drawn up as follows: Refer it to the Master to take an account of what is due to the Plaintiff, on foot of his demand in the bill mentioned, and of all other the debts, legacies, funeral and testamentary expenses of the testator *Patrick James Joyce*, in the bill named, and let the Master take an account of the personal estate of the said testator received by, or come to the hands of, the Defendant, *Mary Joyce*, his executrix, or by or to the hands of any other person or persons, by her order or for her use; and in case such personal estate shall be insufficient for the payment of the testator's debts and legacies, let the Master take an account of the real and freehold estates of the said testator, and of the rents and profits thereof, into whose hands the same came, and how applied and disposed of, and of all charges and incumbrances affecting the said

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(a) 10 Sim. 167.

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estates, and the nature, amount and priority thereof, respectively ; and let the said Master be at liberty to cause advertisements to be published in such of the public papers as he shall think fit, for all creditors of the said testator, and persons having charges and incumbrances affecting his said estates, to come in before him and prove the same; and for better taking of the said accounts, the parties are to produce, &c. ; and let the Plaintiff be at liberty to exhibit an interrogatory for the examination of witnesses to prove the will of the testator, *Patrick James Joyce* ; and let the Defendant *Mary Joyce*, she by her counsel consenting, invest the sum of 1093*l.* 19*s.* 1*d.*, now in her hands, part of the assets of the said testator, in the purchase of Government Three and a half per Cent. stock, with the approbation of the Master, and to transfer said stock, when so purchased, with the privity of the Accountant General of the Court, to the credit of this cause ; and let the dividends be invested from time to time. Reserve the consideration of further directions, and the costs of this suit, until after the Master shall have made his report.

*Reg. Lib.* 87, fol. 125, 1843.

## CROZIER v. CROZIER.

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By deed, certain lands were conveyed to the use of A. for life, and from and after his decease unto and to the use of, and to and amongst such one or more of the child or children of A., by his then wife, as he should by deed or will limit and appoint, and to the heirs and assigns of such child or children, and for default of such appointment, to the children as tenants in common in fee; and for default of such issue, to A. in fee.

indenture bearing date the 22nd of December, 1797, *Rosborough* released and demised the lands of Gortra, county of Fermanagh (of which he was then seised simple), to *John Crozier*, his heirs and assigns, to the use of *John Crozier* for life, without impeachment of “and from and after his decease then unto and to the use of, and to and amongst such one or more of the child or children of the said *John Crozier* by *Katherine Crozier*, otherwise *Rosborough*, his present wife, niece of the said *John Rosborough*, whether son or sons, daughter or daughters, as the said *John Crozier*, by any deed executed in his life-time, or by his last will and testament, by him or by any other person lawfully executed, shall limit and appoint, and to the heirs and assigns of such child or children for ever: and in default of such appointment, then to the use and behoof of the several children of the said *John Crozier* by the said

by his will, without referring to the power, devised the lands to his wife for life, with condition that she should thereout maintain and educate his children, in such manner as the court of chancery should think proper; and he directed that at the end of each year an account should be settled, and that whatever sum should be found in her hands should be placed out to interest, for the purpose of accumulating a fund for the payment of the legacies therein bequeathed. The testator then bequeathed to each of his younger children 500*l.*, and the lands to his eldest son for life, and after his decease to his heirs male and female; and he directed that in case the accumulated fund should not be sufficient for the payment of the legacies to the younger children, the said lands, together with certain other lands which were the subject of the power, should stand charged with the deficiency:—*Held*, that the devise to the eldest son in fee in remainder was a good appointment under the power, and that the gift to the wife was void.

*It was also* held, that the direction for the maintenance and education of the younger children, and the gift of the legacies to them were, *pro tanto*, a due execution of the power; but that the direction for so much of the rents as during the life of the wife was not required for the maintenance of the children, and the payment of their legacies, was void, and therefore went as in the case of a power of appointment.

*It was* further held, that the power to give the estate authorizes, in equity, a sale and a gift of the produce of the

power must not be exceeded, nor its directions evaded; but where there is no prohibitory thing, which is legal and within the limits of the authority, should be supported. It is not to be any trifling distinctions between power and property upon merely technical grounds.

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*Katherine Crozier* his wife, whether they be sons or daughters, or both, and their several and respective heirs and assigns, to take as tenants in common and not as joint tenants, and if there shall be one child, then to such one child, whether son or daughter, his or her heirs and assigns; and for default of such issue, then to the use and behoof of the said *John Crozier*, his heirs and assigns forever," subject, however, to a rent of 48*l.* per annum, to be paid to *John Rosborough* for his life, and after his decease to a rent of 24*l.* per annum to his heirs and assigns.

Immediately after the execution of this deed, *John Crozier* entered into and continued in possession of the lands of Gortra until his decease on the 29th of January, 1814.

*John Crozier* made his will, dated the 22nd of June, 1806: the part of it material to the present case was as follows: viz., "First, I order that all my just debts shall be paid immediately after my decease. I leave and bequeath unto my beloved wife, *Katherine Crozier*, the lands of Gortra, during the term of her natural life. I also bequeath to her, the rents, issues, and profits, arising out of my lands of Moorefield, otherwise Cavanteely Cormick, Crocans, and Coagh, situate in the county of Fermanagh aforesaid, to take and receive the same, until my son *John* shall attain the age of twenty-three years, subject nevertheless and upon the express conditions hereinafter mentioned: that is to say, that she shall, out of the rents and profits arising out of the said lands, maintain, support, and educate the several children, the issue of her and my marriage, that shall be living at the time of my decease, in such a manner as my executors, hereinafter named, shall think fit and direct; and that after all necessary expenses shall be paid by

her for their education and support, then my will is, that at the end of each year, a regular account shall be stated and settled by her, and my other executors; and that whatever sum there may appear to be in her hands, shall be lent out at interest, for the purpose of accumulating a fund to enable my executors to pay off the several legacies, at the certain times hereinafter for that purpose mentioned.

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“ And my will is, and I hereby order and direct, that in order to accumulate a further sum for the payment of the aforesaid legacies, that my executors shall, immediately after my decease, collect and receive half-yearly the rents, issues, and profits, arising out of the lands of Derrikerb, Drumsastry, and Cornavray, and shall immediately upon receiving the same, lend it out at interest for the purpose aforesaid: the legacies in which the abovementioned fund is to be raised in discharge, are as follows: I leave and bequeath unto any younger children, namely, *Thomas, Francis, Robert, Mary, Margaret, Rosborough, and William*, the sum of 500*l.* sterling, each, to be paid to them respectively, upon their attaining their respective ages of twenty-one years, or being married with the consent of my executors, whichever shall first happen after my decease; and in case any of my said several children shall die before they attain the age of twenty-one years, or being married as aforesaid, my will is, that then the sum of 500*l.* sterling, which he or she, as the case may be, would be entitled to, shall go to and amongst my other six children, share and share alike, and in case more than one should die, in like manner so to continue on in proportion, and in like manner as the first, their fortune to go to the survivors.

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“ I give and devise to my eldest son, *John Crozier*, the several lands hereinafter mentioned, that is to say, Moorfield, or otherwise Cavanteely, Cormick, Crockans, and Coagh, to take to his own proper use and benefit, from immediately after he attains the full age of twenty-three years ; and I also give and devise to my said son *John*, the lands of Gortra, Derrikerb, Drumsastry, and Cornavra, to take to his own proper use and behoof, from and immediately after the decease of my said wife, *Katherine Crozier*, all which said several lands and premises are situate in the county of Fermanagh aforesaid, and to take and receive the rents, issues, and profits thereof, for and during the term of his natural life, and after his decease, to the heirs male and female by him lawfully begotten ; subject nevertheless to certain incumbrances and charges hereinafter particularly mentioned and expressed, that is to say, in case there shall not be a sufficient fund accumulated at the time of the death of my said wife, by the rents and interest received by my executors in manner hereinbefore desired to be received, and applied to pay to such of my younger children as shall be then living, a sum of 500*l.* sterling each, my will is, that the said several lands so devised to my said son *John*, shall stand absolutely charged and incumbered with whatever sum there may be deficient or wanting in said fund to enable my executors to pay the said several sums of 500*l.* sterling to each of my younger children.” And the testator then in the event of his son *John Crozier*, not attaining the age of twenty-three years leaving issue, devised the several premises to his other sons successively in like manner, and then to his daughters tenants in common.

At the time of his decease, his wife, *Katherine Crozier*,

and twelve children, eight of whom were named in his will, and four subsequently born, namely, *Baptist, Edward, Everina,* and *Mervyn*, were living.

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With the exception of the dispositions contained in the foregoing will, which did not contain any reference to his power under the deed of 1797, the testator did not make any appointment of the lands of Gortra, nor did he make any provision for the children born subsequently to the date of the will. Upon the decease of the testator, *Katherine Crozier*, his widow, entered into possession of the lands of Gortra, and by indenture, bearing date the 1st of May, 1817, demised these lands to *John Crozier* the younger, for the term of her life, at the rent of 79*l.* 4*s.* per annum. Under this demise *John Crozier* the younger continued in possession to the present time.

The younger children resided with their mother, after the decease of their father, and were maintained by her out of the rents devised to her for life. It appeared that in the month of February, 1827, shortly after the youngest of the children who were born at the date of the will, had attained the age of twenty-one years, an account was settled between them and their mother, and that she then paid the sum of 598*l.* 17*s.* 11*d.*, which appeared by that account to be the sum due on foot of the legacy of 500*l.* given to each of them, and the shares of the legacies of two of the younger children, who had died in the interval. It appeared also, that shortly after the decease of the testator, *John Crozier*, the eldest son, in order to make some provision for the four younger children, who were born subsequently to the date of the will, and who were repre-



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sented as having been wholly unprovided for, executed his bond for 1000*l.* to *Alexander Hudson*, in trust for the said children, to each of whom the sum of 250*l.* was to be paid respectively, on their attaining their full age, free from interest until then, except in case of the death of *Katherine Crozier* before said time ; and that the amount due on that bond was paid before the institution of the present suit by *Katherine Crozier*, their mother, out of her own funds, to the three who survived, and the personal representative of *Mervy* who was dead.

Under these circumstances, the present suit was instituted by some of the younger children of the testator against *Katherine Crozier*, *John Crozier* and others. The Plaintiffs by their bill charged, that *John Crozier*, the testator, had not in any manner exercised the power of appointment contained in the deed of the 22nd of December, 1797, and prayed an account of the rents and profits of the lands of Gortra, received by *Katherine* and *John Crozier* the younger, and a partition thereof among the twelve children of the testator or the representatives of such as were deceased.

*John Crozier* and his mother answered jointly, and they insisted that the will of 1806 was a good execution of the power in the deed of 1797, that the demise of 1817, made to *John Crozier* by *Katherine*, was, in consideration of a reversion, equivalent to the value of the lands ; that the younger children were put to their election, between the shares of Gortra which they claimed, and the legacies given them by the will, and that as the latter had been paid, they should be refunded, if the claim to the former was enforced. They also submitted, that the Plaintiffs were bound to re-

fund to the Defendant, *Katherine Crozier*, the several sums of 250*l.* with interest, or allow credit for the same in taking the account. That said sums were paid only by reason, that those after-born children were left unprovided for, and that it would be unjust to permit the Plaintiffs to receive the said monies on such an understanding, and then to enforce claims against these Defendants, inconsistent with the acceptance of said monies.

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The Attorney-General, Mr. Brooke, and Mr. Gayer, for the Plaintiffs.

Argument.

The limitation to *Katherine Crozier* is void, inasmuch as she was not an object of the testator's power, and the effect of this is not to accelerate the subsequent gifts, but to render them also void. The language of Lord *Kenyon* in *Brudenell v. Elwes*(a), is satisfactory upon this point; *Robinson v. Hardcastle*(b), *Peters v. Morehead*(c), *Alexander v. Alexander*(d). The subject is elaborately discussed in *The Treatise of Powers*(e), and the cases all reviewed; and the opinion there expressed is in accordance with the view now submitted to the Court, that where the first limitation is void, either as being too remote, or as being in favour of a party not an object of the power, a subsequent limitation, though in favour of an object of the power, shall not take effect. In *Routledge v. Dorril*(f), Lord *Alvanley* says, "It would be monstrous to contend, that though it is appointed to *Richard Dorril*, in failure of the existence of persons incapable of taking, yet, not-

(a) 1 East, 442; 7 Ves. 382.

(d) 2 Ves. Sen. 640.

(b) 2 Term R. 241, 781; 2 Bro.

(e) Vol. ii. pp. 69, 73, 76.

C. C. 22, 344.

(f) 2 Ves. 357, 363.

(c) Fort. 339; Fitzg. 156.

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withstanding they exist, he should take, as if it was well appointed to them, and they had failed. It is given upon a contingency, upon which there was no right to give it." The cases depend upon the intention of the testator inconsistent with the acceleration of the subsequent limitation, and not upon any technical grounds. In the present case the intention is plain, the eldest son was not to take anything in the estate, until the previous life estate, given to the wife, was exhausted, and as that estate was void and incapable of arising, the subsequent limitation so depending upon the previous one must also be held to fail. If the Court were to sustain this will as an execution of the power, it must reject every word of the will, except the name of the appointee.

Mr. Serjeant *Warren*, Mr. *Moore*, Mr. *John Brooke*, Mr. *Armstrong*, and Mr. *Peebles* for the Defendant.

The settlement of 1797 does not contain any words sufficient to confer on the donee a power of appointing particular estates to the objects of the power. It simply created a power of selection. The donee was authorized to determine the number by whom the estate should be taken, but he had no power to determine the quantity of the estates to be by them taken; accordingly, here the party has, by naming *John Crozier*, selected him; this selection has exhausted his power. He has shewn his intention, as far as is required for the purpose of the execution of the power; the donor and the law confer on him thus selected the fee simple, and the remainder of the directions of the testator will be rejected as excessive. There is no direct authority on the point. The case put by Mr. *Fearne*,

in his *Treatise on Contingent Remainders*(a), most nearly resembles the present. In *Stratton v. Best*(b), the power was "to permit and suffer all and every the child and children of the marriage, to receive the rents, &c. to them and their heirs for ever, in such shares and proportions, &c.," and on this, Mr. *Mitford* in his argument observes(c), "It is certainly clear, the father had no power to appoint the estates, but only the shares the children were to take." But it is argued on the part of the Plaintiffs, that inasmuch as the appointment to the wife, which precedes the gift to the Defendant, *John Crozier*, is void, because she was not an object of the power, that consequently, the subsequent appointment to the son, which is dependent upon that particular estate, must also fail. It is a mistake, however, to say, that the subsequent limitation is dependent upon the other; on the contrary, it is totally unconnected with it, and if so, there is no reason why it might not take effect, notwithstanding that the previous disposition was bad. The intention of the testator was evidently to give the entire estate to his son *John*, subject, it is true, to a life estate in favour of his wife. This latter object he could not effect. The consequence is, that the appointment to the wife must be considered as if it had never been inserted in the will, and the limitation to *John* will be consequently accelerated. In *Brudenell v. Elwes*(d), which has been so much relied upon at the other side, the void gifts and the valid appointment were so connected, that it was impossible to separate them from each other. There an estate tail was limited to persons not objects of the power, and the subsequent appointment, which was valid, was only to arise upon the determination of that estate tail; the intention there was plain; Lord

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(a) Page 230.

(b) 2 Bro. C. C. 233, 235.

(c) Page 235.

(d) 1 East, 442.

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*Kenyon* states, that it was clear, that the testatrix did not intend that the subsequent limitation over to the daughter, should be accelerated; it was made to depend upon the intermediate limitations to the issue of her brothers, and she was not to take until their issue male were extinct. That case, therefore, cannot govern the present, where the limitations are not dependent upon each other, and where the intention that the Defendant should take the whole estate, in any event, is manifest. *Crompe v. Barrow*(a) closely resembles the present case; there there was a power to appoint to children, and an appointment was made to a child for life, and after his decease, to his wife and children (who were not objects of the power), and in case he should die without leaving a wife or child him surviving, then to his sister, who was an object of the power. It was submitted, that the ultimate limitation to the sister depended upon the preceding estates given to the wife and children, and must, therefore, fall with them. Lord *Alvanley*, however, held the gift over to the daughter to be good, and that it was not defeated by the preceding void limitation. "The limitation," his Lordship observed, "fails as far as it affects to give interests to the children: but is there any occasion to make it fail upon the other point, the gift over to a person who is an object of the power? Why am I to exclude the person taking over, who has a right to take? There are two alternatives; if *Charles Barrow* (the son) leave no wife or children at his death, then the limitation over, being to a good object, shall take effect; if he does leave a wife or children, then it cannot take effect."

Mr. *Gayer* in reply.

(a) 4 Ves. 681.

THE LORD CHANCELLOR :—

In this case, the settlement of Gortra was to the father, *John Crozier*, for life, and after his decease, to the use of, and to, and amongst such one or more of the child or children of him by his wife, as he should appoint, and to the heirs and assigns of such child and children for ever; and for default of such appointment, to the children as tenants in common in fee, and for default of such issue, which means in default of such children, to *John* in fee. The devise of Gortra, which was made without reference to the power, but was an execution of it, as the estate was devised by name, was treated at the bar as a devise to the wife for life, with remainder to the eldest son in fee. It was contended that the life estate being void, the remainder after it was also void, and it was admitted, that the principle of the decisions was against the validity of the devise in remainder to the son.

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I purpose to consider how the law stands in the case of a devise not under a power, and how far that law applies to this case. Secondly, the extent of the decisions upon appointments, and their applicability to devises not under powers. And lastly, whether the devise in remainder to the son is struck at by the authorities, or the principles, upon which they were decided.

First, it is laid down, as early as 9 Hen. VI.(a), by *Godred*, that a devise is more powerful than a grant by deed; for if one lease lands by deed to a man who is professed (who is not *capax*) for life, the remainder over in fee, or land is leased for life to a man, where there is none

(a) Year Book, 9 Hen. VI., 24.

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such in *rerum naturâ* for life, the remainder over in fee; that remainder and all is void for *debile fundamentum*, &c.; but in both the cases, upon a devise the remainder is good; and this is adopted in *Rolle's Abridgement*(a), *Plowden*(b), and many other authorities. *Perkins*(c) says, that although the monk survive the testator, the remainder shall take effect presently. In *Trinity College Case*(d), Chief Justice *Flemming*, and in *Thornby v. Fleetwood*(e), Lord Chief Justice *Trevor* lay down the rule generally, that a devise to one, who is a monk, with remainder over, this is a good remainder. I may further refer to the doctrine of Chief Justice *Treby*, in *Scatterwood v. Edge*(f). In *Avelyn v. Ward*(g), Lord *Hardwicke*, not speaking of gifts void as perpetuities, observed, "that he knew no case of a remainder, or conditional limitation over of a real estate, whether by way of particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation, but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place." In like manner a devise to one in fee after the death of the third person, to whom no previous estate is limited, is valid, and the estate, during the life of that third person, either vests in him by implication, or descends to the heir at law according to the intention of the testator.

It appears, therefore, that although the particular estate is given to a person incapable of taking, or is not given at all, the devise in remainder or at the future time is valid.

(a) Tit. Remainder, (C. 4. 5.)

(e) *Strange*, 318.

(b) Page 414.

(f) 1 *Salk.* 229.

(c) Sec. 567.

(g) 1 *Ves. Sen.* 420.(d) 2 *Gouldsb.* 246, 247.

Now this depends wholly upon intention, which the Courts execute even at the expense of the general rule of law, and this intention is thus executed, because the disposition is by will. Whether a man have the fee vested in him, or only a general power of appointment, his intention expressed in his will is equally to be executed. It matters not whether he appoints or devises, provided that he do not exceed his power. For example, suppose a man, having a general power of appointment, to appoint by will to a monk for life (as under the old law), remainder to A in fee. No doubt the estate for life would be void, and the gift to A be good. If the power be confined to particular objects, it cannot be exceeded, but within its limits, the intention of the testator, the donee of the power, must be observed. In this case, therefore, let us suppose a similar devise to a monk for life, remainder to the eldest son of the testator in fee, the life interest would be void by the general law, and also as an appointment to a stranger : but there is no reason why a different rule should be applied to the gift of the remainder, from that which would apply to a devise not under a power. I assume that the power authorized a gift of a remainder in fee, and then the testator's disposition stands on the same footing with a similar one by a deviser seised in fee. There ought to be no trifling distinctions between power and property upon merely technical grounds. The object of powers sanctioned by law is to enable the donee, to the extent of the authority, to do what a commensurate estate would have enabled him to accomplish. In the cases of powers indeed the intention would be effectuated beyond the naked cases at law, for there the particular estate is defeated, and the remainder is accelerated, whilst in the former cases, although the estate for life is void, yet the remainder continues such, and the estate,

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during the life of the intended taker, goes as in default of appointment.

But it is supposed that the point is concluded by the authorities; I shall now, therefore, proceed to consider the cases, which have arisen under powers. The doctrine laid down in *Alexander v. Alexander*(a) cannot be disputed: the power was to appoint to children; the appointment was to a daughter for life, and, after her death, to her children living at her death; in default of such children, to the daughter herself, if she survived her husband; but if she died in his life-time, to two other children. The gift to the grandchildren was held to be void. Sir *Thomas Clarke* said, as to the gifts over, suppose the daughter leaves children at the time of her death, it was impossible any of these limitations over should take effect; and the children, though they could not take themselves, would yet prevent the limitation over. I may observe that the testator's intention would have forbidden a contrary construction, for, in the case assumed, the testator did not intend the limitation over to operate. In *Cavendish v. Cavendish*(b), where, under a power to appoint to children, the appointment by will was to a son *Richard* for life, with remainder to his sons in tail, with remainder to another son *George* for life, Lord *Mansfield*, in delivering the judgment of the Court, said, that it was objected that the appointment, being void in part, should be void *in toto*; but as to that, they were of opinion, that if void as to the children, it was good to *George* for life. Now this opinion is not supported by later authorities; but it shews powerfully that in the opinion of that Court there was nothing in the

(a) 2 Ves. Sen. 640.

(b) 4 Term R. 741 (π).

nature of an appointment which would prevent gifts over to objects from taking effect, where gifts to strangers could be displaced; or, in other words, that appointments under powers were in this respect subject to the general law. The same point arose in *Robinson v. Hardcastle*(a): Lord *Thurlow* sent it to law, but he observed that the question was, whether such an illegal estate being interposed, it shall not be considered as a nullity, and the next estate be brought forward, and attached to the estate for life. The cases seemed to support this doctrine, but not so clearly, as for it not to deserve further consideration. This, he said, was a will; the object of it was to execute a power; it must have, therefore, the favourable construction of a will, and you must consider the testator as intending, if the first use was bad, that the subsequent limitation should take place, therefore this seemed an extraordinary intent to attribute to him. The case at law is reported in the Term Reports(b), and I may observe that the marginal note is altogether inaccurate. It was twice argued: upon the first argument Mr. Justice *Buller* observed, that if a subsequent limitation depended upon a prior estate, which was void, the subsequent one must fall together with it. If, indeed, the subsequent limitation was not dependent upon the other, it might then take place, notwithstanding the first was bad. This is explained by the argument at the bar, for in referring to devises to a monk with a remainder over, it was said that there the remainders were vested in persons then in being, and did not depend upon the preceding estate. After the second argument, the learned judge held that *Alexander v. Alexander* was an authority against accelerating the remainder to the objects of the

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(a) 2 Bro. C. C. 22, 344.

(b) Vol. ii. p. 241.

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power, and he observed that it would be contrary to the intention. The certificate, which was altered in consequence of the doubt, whether the son did not take an estate tail(a), was confirmed by the Lord Chancellor. In the case of *Routledge v. Dorril*(b), Lord *Alvanley* followed *Alexander v. Alexander* and *Robinson v. Hardcastle*, and thought it would be monstrous to contend, that though "the appointment to the child was in failure of the existence of persons incapable of taking, yet, notwithstanding they exist, he should take as if it was not appointed to them and they had failed." The same point was decided the same way in *Brudenell v. Elwes*(c), and Lord *Kenyon* rested the case upon the intention, and the bill in equity was dismissed(d). Lord *Alvanley* decided in *Crompe v. Barrow*(e) that where the gift over to the object of the power was concurrent with the invalid gift, that is, where the contingency was with a double aspect, and the event happened, which gave effect only to the valid gift, it would operate.

This review of the authorities has satisfied me that the question turns upon the intention, and not upon any thing peculiar to powers, beyond the circumstance that the invalidity of the intermediate estates was occasioned by an excess in the execution of the power. When I argued the case of *Beard v. Westcott*(f), which Lord *Eldon* affirmed(g), I relied upon the rule, established by the cases upon powers, to which I have referred. That case did not depend upon a power. The testator devised, first, valid uses; secondly,

(a) 2 Term R. 241, 781.

(b) 2 Ves. 357.

(c) 1 East, 442.

(d) 7 Ves. 382.

(e) 4 Ves. 681.

(f) 5 Barn. & A. 801; *Gilbert* on Uses, by Sugden, 270 (n).

(g) Turn. & R. 25.

ies, as tending to a perpetuity ; and, thirdly, uses  
g upon the contingent determination, within the  
llowed by law, of the invalid uses. The Court of

Pleas(a) held that the third gifts would be good  
ent happened. This always appeared to me to be  
for the consequence was, that there might be a  
a *esse* entitled to take according to the words of  
imitation in the will, but incapable in law, and a  
r man *in esse* capable of taking by law, but inca-  
taking under the will, because the contingency  
happened, which was to determine the preceding

There was another important point in the case,  
ough the Court of King's Bench did not in their  
: express the ground upon which they differed

Court of Common Pleas, I always considered it  
t which I have just stated, and which we have now  
e Court. The same rule of law was considered  
e whether the intermediate remainders were in-  
an excess of the power, or by reason of a general  
w. Even in a case upon a power to appoint to  
Sir *Thomas Clarke*, in *Alexander v. Alexander*,  
that under an appointment indefinitely to a son by  
io never appeared to have existed, or was never  
of taking, and others, who were capable of  
he latter would have the whole, must, he said,  
as the others were incapable of taking ; and he  
case fell within the reason of a case, to which he  
and which was a case of general bequest not ope-  
der a power. I do not say that I could follow this  
t, but I quote it to shew that these cases have  
ided upon reasons applicable to all devises, and

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not confined to appointments by will under powers. I feel myself, therefore, altogether relieved in this case, from the pressure of the authorities, which have decided against the validity of the ultimate gifts over: they do not apply to this case, for here although the life interest is void, yet it would still further defeat the testator's intention, if the remainder in fee to his eldest son were not supported, and the cases, to which I first referred, enable me to give to that extent effect to his intention. So far, therefore, as depends upon the points already considered, I hold that although the estate for life was void, the gift in remainder to the eldest son in fee was valid.

But before I make this declaration, I must be satisfied that this power, which is an exclusive one, authorized the appointment of a remainder in fee to the son. I am of opinion that it cannot be maintained, that the settlement itself limited the quantity of estate which the appointees were to take, and left it to the donee of the power only to designate the objects to take; and I think that under such a power as this, which extends to the fee, a lesser interest may be appointed: *Bovey v. Smith(a)*, *Phelp v. Hay(b)*, both prove this proposition to a great extent. I should think it mischievous to determine otherwise. The power must not be exceeded nor its directions evaded; but where there is no prohibition, every thing which is legal and within the limits of the authority should be supported, and therefore I think that a power to appoint a fee, but with no prohibition against giving a less estate, ought to be held to authorize any legal limitations within the scope of the power

(a) 1 Vern. 84.

(b) *Treatise of Powers*, vol. ii. App. 16.

which may be served out of the fee. The appointment, however, here is in fee, but it is in remainder. In *Cavendish v. Cavendish*, Lord *Mansfield*, in delivering the opinion of the Court, answered this objection. He said *Alexander v. Alexander* was cited, in which case the Master of the Rolls was of opinion that a reversion could not be given, —but why? Because it was meant as a portion; but this was not so.

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There is another point which has struck me upon this will: the devise is to the wife for life, but it is to educate and maintain his children, and to provide portions of 500*l.* a-piece for the seven children then living. I think that these provisions were within the scope of the power, although certainly that is a very liberal construction. These sums were, however, charged on the remainder in fee of the son absolutely, so that they were charges on the inheritance, and the disposition of so much of the estate, and in that view, under even a strict construction of the power, might be deemed a good equitable execution; for a power to give the estate authorizes, in equity, a sale and a gift of the produce of the estate. In this Court, the circumstance of these purposes being effected through a devise to a stranger is immaterial, for that is a defective execution, which this Court will aid. The provision for maintenance should be held to cease, when the children attained twenty-one, or as to any of the seven children who became entitled to portions, or married before twenty-one, upon that event. The wife, perhaps, was not intended to take any beneficial interest, but I cannot act upon that view. As however, although a stranger, the excess in the execution of the power in the benefit intended for her is clearly distinguishable from the benefits provided for the children, I

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shall declare the excess only to be void upon the authority of *Alexander v. Alexander*. The other two estates did not become available for the portions, &c.; but the surplus personal estate would be a fund applicable to the 500*l* portions. I shall declare the gift to the wife for life void, but that the trusts and purposes are valid so far as they are in favour of the children, and void only as to the excess in favour of the wife, and that the gift to the son in fee in remainder is valid. The Master must ascertain when the portions and the maintenance and education purposes were raised, or could have been raised, by a due application of the rents and profits, and of the surplus personal estate; and let it be declared, that from the period when the portions were or could have been raised, the rents and profits during the wife's life belonged to all the children as tenants in common under the settlement, and the Plaintiffs' rights will be declared accordingly. Reserve the costs until after the Master has made his Report. If, however, the Plaintiffs do not think it worth while to take the account, I will at once dismiss the bill without costs.

Jan. 27.

On this day the *Attorney-General*, on the part of the Plaintiffs, declined to take the account; and the bill was accordingly dismissed without costs.

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*JOHN ROSBOROUGH* made his will, dated the 8th of May, 1803, to the effect following:—

After certain devises and bequests not material in the present case, it proceeded thus: “ I give and devise unto my nephew, *John Crozier*, senior, of Gortra, in the county of Fermanagh, the lands of Drumsastry, Derrikerb, and Cornavray, situate, &c., to hold to him during his natural life; and from and after his decease I give and devise the same unto the issue male and female of the said *John Crozier*, now begotten, or to be begotten on the body of his present wife, *Katherine Crozier*, otherwise *Rosborough*, to be divided between and amongst them in such manner, shares and proportions, as the said *John Crozier* shall, by his last will and testament, limit and appoint, subject, nevertheless, to the provisoes hereinafter particularly mentioned, that is to say, that the said *John Crozier*, his heirs, executors, administrators, and assigns, and the persons who shall become entitled thereto under this my will, shall and will, well and truly, pay the head landlord’s rent of the said lands, and shall and will, yearly and every year, during the continuance of the lease, pay or cause to be paid to my grand-nephew, *John Scott*, his heirs or assigns, one yearly annuity or sum of 40*l.*, &c. to be issuing and payable to him out of all and every the said lands, &c.; I give and

*Jan. 18, 26.*

A testator devised lands, of which he was seised *pur autre vie*, to his nephew, J. C., for life, and then proceeded thus: “ And from and after his decease, I give and devise the same unto the issue male and female of the said J. C. now begotten, or to be begotten, on the body of his present wife, to be divided between and amongst them in such manner, shares and proportions, as the said J. C. shall, by his last will, limit and appoint; subject, nevertheless, to the provisions hereinafter particularly mentioned, viz. that the said J. C., his heirs, executors, administrators, and assigns, and the persons, who shall become entitled thereto, under this my will, shall and will pay the head land-

lord’s rent of the said lands, and shall and will, yearly and every year, during the continuance of the lease, pay, or cause to be paid, to S., his heirs or assigns, one yearly annuity or sum of 40*l.*, &c.” J. C. did not duly exercise his power of appointment:—

*Held*, that J. C. took an estate for life only; and that his issue took absolute interests as tenants in common as purchasers; and that the words “ issue male and female” meant sons and daughters, or the first line of issue.



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devise to my grand-nephew, *Alexander Scott*, the lands of Derrydown, &c., to hold to him and his heirs for ever.' - -."

These clauses were followed by several pecuniary bequests, by a devise of certain other freehold properties of the testator, and by a residuary devise expressed in these words: "As to all the rest, residue, and remainder of my estate and property, whether real, freehold, or personal, of what nature or kind soever, that I shall die seised or possessed of, or entitled unto, and not hereby particularly devised, bequeathed, or disposed of, I give, devise, and bequeath the same to my brother, *Thomas Rosborough*, and his wife, *Frances Rosborough*, for and during their natural lives;" with limitations over.

At the time of making his will *John Rosborough* was seised of the lands of Drumsastry, Derrikerb, and Corra-vray, under a lease thereof for three lives, from the Earl of *Lanesborough*, and at a rent of 240*l.* per annum.

*John Crozier*, the nephew of the testator, by his will of the 22nd of January, 1806(a), bequeathed unto his younger children, *Thomas*, *Frances*, *Robert*, *Mary*, *Margaret Rosborough*, and *William*, the sum of 500*l.* each, to be paid to them respectively upon their attaining their respective ages of twenty-one years, or marrying with the consent of his executors, whichever should first happen; with a direction that in case any of the said children should die before that period, the share of such child should go to and amongst the survivors. The testator further directed, that in order to accumulate a sum for the payment of the said

(a) See ante, p. 355.

egacies, his executors should immediately after his decease collect and receive half-yearly the rents and profits arising out of the lands of Drumsastry, Derrikerb, and Cornavray, and upon receiving same, invest it at interest for the purpose aforesaid. The testator, *John Crozier*, then devised the said lands of Gortra, Derrikerb, Drumsastry, and Cornavray, to his eldest son, *John Crozier*, to take to his own proper use and behoof from and immediately after the decease of his wife, *Katherine Crozier*, for and during his natural life; and after his decease, to his heirs male and female by him lawfully begotten, subject to the payment of so much of the said legacies of 500*l.* to each of his younger children, as the fund directed to be raised in the previous part of his will for the payment hereof should be insufficient to satisfy. In failure of his said son attaining the age of twenty-three years, or leaving lawful issue, the testator devised the said lands to his second son, *Thomas*, with remainders over.

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The testator, *John Crozier*, died in January, 1814. Subsequently to the date of *John Crozier's* will there were four other children born to him, *Baptist, Edward, Evelina*, and *Mervyn*. *John Crozier*, however, died without making any provision for these children, or in any respect altering his will. It was stated that shortly after the decease of *John Crozier*, a case was laid before counsel, on behalf of his widow and eldest son, relative to the rights of the younger children to a share of the lands devised by *John Rosborough*. It did not appear that the opinion given upon this case was ever communicated to the younger children; but on the 20th of September, 1814, *John Crozier*, the eldest son, executed his bond for 1000*l.* for the benefit of the four children who were born subsequently to

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the date of their father's will, at the instance and under the belief, as the Defendant in his answer stated, that these children were left wholly unprovided for under their father's will; and it was represented that the amount of this bond had been paid.

The bill in this cause was filed by *Edward Crozier*, one of the subsequently born children, claiming to be entitled to a share of the lands devised by the will of *John Rosborough*. The Plaintiff submitted that his father took but a life estate in the lands in question under the will of his uncle, with a power of appointment among his children; and that not having properly exercised this power, the lands passed as in default of appointment. The bill accordingly sought for a partition among the younger children, and an account of the rents and profits since the time the Plaintiff became entitled to receive the same.

The Defendant, *John Crozier*, by his answer, insisted that, upon the true construction of the will of *John Rosborough*, his father took an estate *quasi* in tail, and that as he had not executed any deed, or done any act to bar the entail, the lands came to him upon the decease of his father as the heir *quasi* in tail.

Argument.

The *Attorney-General*, Mr. *Brooke*, and Mr. *Gayer*, for the Plaintiff.

The question here is, whether the word "issue" operates as a word of limitation or of purchase. It may have either effect in a will; nay further, if it stood alone, unconnected with terms indicating a contrary intention in the mind of the testator, it must be admitted that the word would be construed to be a word of limitation: on the other hand,

while the phrase "heirs of the body" imports an estate tail, the word "issue" has not any such import *ex vi termini*, but this Court looks to the intention. In this devise, words are used inconsistent with an estate tail in the first taker, for there is given to the first taker a power of appointing the property to his issue "in such shares and proportions," which indicates the testator's intention that the property should not devolve on any one individual of *John Crozier's* issue. The gift in *Hockley v. Mawbey(a)* was similar in its terms to the present, and the issue were held to take as purchasers, Lord *Loughborough* observing, "it is clear the testator did not intend the estate to go to them as heirs in tail, for he meant they should take distributively, and according to proportions to be fixed by the son." In *Lees v. Mosley(b)*, the decision was to the same effect; in giving judgment Mr. Baron *Alderson* says, "the authorities clearly shew, that whatever be the *primâ facie* meaning of the word 'issue,' it will yield to the intention of the testator to be collected from the will; and that it requires a less demonstrative context to shew such intention, than the technical expression of 'heirs of the body' would do." In *Ryan v. Cowley(c)*, your Lordship took a distinction between a gift to one for life, with remainder to his issue, in such shares as he should appoint; and a similar devise for life, with remainder "to the heirs of the body;" and the decision in *Jesson v. Wright(d)*, was referred to the intention of the testator in that case, to include the whole line of issue, which could only be effected by giving an estate tail. The property here is not an estate of inheritance; the first taker, therefore, if held to take an estate *quasi* in tail, would have absolute power over the

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(a) 1 Ves. 143, 149.

(c) Lloyd &amp; G. temp. Sugden, 7.

(b) 1 Younge &amp; C. 589, 609.

(d) 2 Bligh, O. S. 1.

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property, *Allen v. Allen*(a). It may be said there are not words of limitation to give more than life estates to the issue here, *Doe v. Robinson*(b), *Allen v. Allen*; but, in the first place, the word "manner" occurs in the power of appointment, and one manner would be, to appoint absolute interests; and then these cases only shew that to create more than a life interest in the devisee, there must be some evidence on the face of the will of an intention to that effect. In this will there is no gift over in case of failure of issue, a circumstance so much relied on in *King v. Mellling*(c): indeed, with one exception, none of the observations of Sir *Matthew Hale* in that case apply to the present; and although it is there said, that "in all Acts of Parliament *exitus* is as comprehensive as heirs of the body," yet *Lees v. Mosley*(d) shews that it is not of equivalent force as a word of limitation. The case of *King v. Mellling* is not sought to be impeached; it is only referred to as an exponent of the principle, upon which the cases on this subject have been decided. In *Roe v. Grew*(e), there was a devise over "for want of such issue;" so also in *Frank v. Stovin*(f), and *Doe v. Cooper*(g). In *Pierston v. Vickers*(h), the words were "heirs of the body." In *Doe v. Collis*(i), on the other hand, there was no gift over, and the issue were held to take as purchasers. [THE LORD CHANCELLOR:—This is not the same case. Here the intention of the testator must be spelled out; there the word "heirs" was superadded to the gift to the issue.]

Mr. *Bessonnet* and Mr. *Butt*, for a Defendant, in the

(a) 2 D. & Warren, 307.

(b) 8 Barn. & C. 296.

(c) 1 Vent. 225.

(d) 1 Younge & C. 589.

(e) 2 Wils. 322; Wilm. 272.

(f) 3 East, 548.

(g) 1 East, 229.

(h) 5 East, 548.

(i) 4 Term R. 294.

the interest with the Plaintiff, referred to *Mitchell Coulson(a)*, *Mandeville's case(b)*, and *Campbell v. Medys(c)*.

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Mr. Serjeant *Warren*, Mr. *Moore*, Mr. *John Brooke*, Mr. *Armstrong*, and Mr. *Peebles*, for the Defendant, *John Crozier*.

The first part of this will, if it stood alone, would, as is already admitted, create an estate *quasi* in tail in *John Crozier*: are there, then, sufficient words in the subsequent part to cut down that estate? Are the words "to be divided between and amongst them," &c., sufficient? *Jessell v. Wright(d)* has established that a devise to a person for life, with remainder to the heirs of his body, will create an estate tail, notwithstanding the use by the testator of subsequent words of modification inconsistent with an estate tail. A series of authorities shew that "issue" is a word of limitation as well as "heirs of the body." *Tate v. Ark(e)* is the last case upon the subject: there Lord *Langdale* says, "the word 'issue' is a word of limitation, if the context of the will does not afford sufficient reasons to construe it otherwise. In the present will, I think that it must be construed in a sense different from 'heirs of the body'; and if the words 'heirs of the body' had been employed, I think that neither the superadded words, *primâ* *que* denoting distribution, nor the want of a gift over, in default of issue, would have afforded sufficient reasons for construing the words otherwise than as words of limitation." *Lees v. Mosley(f)* is distinguishable both from

(a) 1 Huds. & B. 210.

(b) Co. Litt. 26, b.

(c) 1 Sch. & L. 281.

(d) 2 Bligh, O. S. 1.

(e) 1 Beav. 100.

(f) 1 Younge & C. 589.

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*Jesson v. Wright* and the present case, for there the gift was to “*Henry James* for life, with remainder to his lawful issue and their respective heirs,” thus engrafting express words of limitation on the gift to the issue. The testator was not ignorant of technical words, for his will contains devises to his grand-nephews and their heirs. The direction to pay the annuity to *Scott* is favourable to the construction which gives to “issue” the effect of a word of limitation, for if *John Crozier’s* heirs are to pay as heirs, he must take the absolute interest. *Doe v. Featherstone*(a), *Irwin v. Cuff*(b), and *Merest v. James*(c), were also cited.

Mr. Gayer in reply.

The intention of the testator in this case, it is submitted, is clear beyond all doubt. His object was to give his nephew, *John Crozier*, but a life estate, with a power of appointment among his children: and *Hockley v. Mawbey*(c), a case of high authority, which is relied on in *Lees v. Mosley*(d), in every point of view, supports the construction which the Plaintiff contends for. In *Tate v. Clark*(e), which has been pressed at the other side, the words “for ever” were annexed to the gift to the issue, which renders that case totally inapplicable to the present.

Judgment. THE LORD CHANCELLOR :—

I do not feel any great difficulty in this case. It is perfectly settled that the expression “issue male and female” will, in construction, bend more easily to the inten-

(a) 1 Barn. & Ad. 944.

(b) Hayes, 30.

(c) 1 Brod. & B. 484.

(d) 1 Ves. 143.

(e) 1 Younge & C. 589.

(f) 1 Beav. 100.

of the testator than words such as "heirs of the body," which are more inflexible, and denote a line of successive takers. Where there is a gift to one for life, with remainder to the heirs of his body, in which case, by the operation of the rule in *Shelley's case*, the ancestor is held to take an estate tail, the expression "heirs of the body" has its technical, and, I may say, its natural meaning; this limitation is of a different character: it is in these words: "I give unto my nephew, *John Crozier*, the lands of Drumsastry, Derrikerb, and Cornavray, to hold to him during his natural life; and from and after his decease I give the same unto the issue, male and female, of the said *John Crozier*, now begotten, or to be begotten, on the body of his present wife, *Katherine Crozier*, otherwise *borough*, to be divided between and amongst them in equal manner, shares and proportions, as the said *John Crozier* shall, by his last will and testament, limit and appoint, subject, nevertheless, to the provisos hereinafter particularly mentioned." Now there is great difficulty in this case, unless it can be shewn that "issue male and female" mean children: but, to adopt that construction, must be made out that the issue would take the whole interest, because it is clear that the testator intended to dispose of the whole interest; and if they are not capable of taking it under the limitation to them alone, that is, to them as purchasers, then you must try, if they cannot take under the joint effect of the two limitations, that is, through their father, in which case he must be held to take an estate *quasi* in tail. The decision of the House of Lords in *Jesson v. Wright*(a) turned upon this principle. The opinion of the Court of King's Bench(b) defeated

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(a) 2 Bligh, O. S. 1.

(b) 5 Maule & S. 95.



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every intention of the testator in that case; for clearly his meaning was, that the estate should not go over, according to the final limitation, until there was a total failure of the issue of the first taker. The Lords did not establish any new doctrine, they merely restored and supported the former authorities, giving to the words their technical and natural import. In that case there was not any way in which the Court could have effectuated the intention but by giving the father an estate tail. Here an estate for life is expressly given to *John Crozier*; but the words themselves are not sufficient to pass all the interest to the issue, unless the subsequent words denote such an intention.

I have on a former occasion<sup>(a)</sup> expressed my approbation of the decision in the case of *Doe v. Robinson*. I think that case was rightly decided, and that there is nothing so peculiar in the nature of property held *pur auter vie*, as to justify the Court in dispensing with the use of the proper technical words, which are required to carry the fee in the case of lands of inheritance; therefore, in order to construe this will, so as to vest all the interest in the children by purchase, I must find something which indicates an intention to give it to them. Now in this will, although there is no express gift over, there is a general residuary gift which would include everything not previously disposed of, whether within the immediate intention of the testator or not. But still that has not the same force, which it would have had, if the testator had introduced it by the common words "and in default of such issue," because that would have aided in the explanation of the previous words. Where there is a gift to A for life, and if A die without

(a) *Allen v. Allen*, 2 D. & Warren, 327.

sue, then over, although there is no gift to the issue, yet, by implication, the law intends that the issue are objects of the testator's bounty, and by giving an estate tail to them, effect is given to all the words of the will.

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In this case there is a repetition of the formal words of the devise, "and from and after his decease I give and devise the same"—this looks like a new gift—"unto the issue male and female of the said *John Crozier*, now begotten or to be begotten on the body of his present wife, to be divided between and amongst them in such shares and proportions as the said *John Crozier* shall, by his last will and testament, limit and appoint." It was not argued at the bar, what interest might have been appointed to the issue under this power; I am, however, clearly of opinion that the whole interest might have been appointed, and, if so, the gift by the will to the issue in default of appointment, by implication, cannot be considered to be less than that might have been appointed to them by the exercise of the power. Here again there are words of division, "between and amongst them;" and although these words may be, and often are, rejected in a will, yet it is only in favour of some paramount and governing intention of the testator, which could never have effect unless those words were to give way. These words, therefore, are of some importance; but the following clause appears to me to put the matter beyond all doubt: the words are, "subject, nevertheless, to the provisoes hereinafter particularly mentioned; that is to say, that the said *John Crozier*, his heirs, executors, administrators, and assigns, and the persons, who shall become entitled thereto under this my will, shall and will, well and truly, pay the head landlord's rent of said lands, and shall and will, yearly and every year

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during the continuance of the lease, pay, or cause to be paid, to my grand-nephew, *John Scott*, his heirs or assigns, one yearly annuity or sum of 40*l.*” What then is directed to be done under this clause? An annuity is to be paid during the continuance of the lease; and who are to pay it?—why, the persons who, from time to time, should become entitled to the lease. The estate and the annuity were to be commensurate; and as the annuity was to last during the continuance of the lease, the entire interest of the testator in the lease must be considered to have passed under the previous clause. The persons to pay are *John Crozier*, his heirs, executors, administrators, and assigns and the persons who, from time to time, shall become entitled thereto under this my will. This is incorrect. *John Crozier* took for his life; the subsequent words which include his heirs, executors, and administrators were thrown in unskilfully. A life estate is expressly given to *John Crozier*, and afterwards to a class, which must include his heirs, but the gift to them is in the character of heirs. Must I not suppose that the testator, when he says “*John Crozier*, his heirs, executors, administrators,” &c., was alluding in this clause to those persons, to whom he had given the property in the preceding clause—I mean the persons comprehended in the description “issue male and female.”

The will appears to me to be clear and free from any ambiguity; but as this case is a very important one, I shall look into it again before I dispose of it finally, although it depends upon authorities, with which I have been familiar for the greater part of my life: at present, my strong impression is, that the father took for life, and the children absolutely.

THE LORD CHANCELLOR :—

I have attentively considered this case, and I have looked to the principal authorities. Few judges are less disposed than I am to cut down the general import of clear words of limitation. The danger of doing so is shewn in the case of *Jesson v. Wright*, the reasons in which case, as they have been referred to, I may observe, were written immediately after the judgment of the King's Bench was pronounced ; and the rules there propounded are, I believe, warranted in law. In this case the devise is to the issue, and that word may, undoubtedly, be construed a word of limitation of purchase, according to the sense in which it is used by the testator, but always adhering to settled rules. Now where the devise is not simply to a man and his issue, but an express estate for life is given to *John* himself, and after his decease there is a separate gift to the issue male and female of *John* now begotten, or to be begotten, on the body of his present wife, to be divided between and amongst them in such manner, shares and proportions, as *John* should by will appoint. The terms of this gift shew, that the testator meant *John* to take expressly for life, and that he was providing for the children then born, of whom there were many, and although he provided also for issue to be begotten, yet it is not an unfair inference, that he meant the like class, namely, children, the first line of issue. The terms of the devise also shew, that he meant the issue to take amongst themselves as tenants in common and not in succession, according to seniority as issue in tail, although the extent of every share was left in the power of the father. But life estate, separate gift, reference to issue born, tenancy in common, power to vary the shares, would all give way, and *John* would be held to take a *quasi* estate tail, if the will shewed a clear intention to include all possible

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issue, and that they could only take under the father. This will shews no such intention; every thing which have stated leads to the opposite conclusion, and there is nothing to defeat that view; for not only is there not a gift over in default of issue, but there is a clear intention to vest the whole estate in the issue, which I explained when the cause was heard. I am of opinion, therefore, that the issue take the whole estate as tenants in common as purchasers, and that issue, male or female, means sons and daughters, or the first line of issue.

I am not, having regard to the facts of this case, embarrassed with the question, whether issue would have included grandchildren living at *John's* death. My own opinion is, that in this case it meant children. It would be mere pedantry to go over the cases. *Hockley v. Maubey*(a), and *Lees v. Mosley*(b), in which case all the authorities are collected, are clear authorities for the declaration which I am about to make, but my decision proceeds upon the general warrant of authority. *John* and his mother ought not to have kept the afterborn children in ignorance of their rights; but on the other hand, the 1000*l.* was clearly secured by *John*, and paid, it is said, by the mother as portions; that is proved by the indorsement on the bond and warrant of attorney, and it was not until the Plaintiff had received his portion, that he sought to impeach the will of his father. I shall, therefore, confine the account to the filing of the bill. The costs of all parties are to come out of the estate. I must declare that all the children took as tenants in common the whole interest, and that the Plaintiff is entitled to his proportion accordingly. The Plaintiff may have a partition, if he desires it.

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(a) 1 Ves. 143.

(b) 1 Younge & C. 589.

**Declare** that under the true construction of the will of *John Rosborough*, bearing date 8th May, 1802, all the children of *John Crozier* the elder, living at his death, upon the death of said *John Crozier*, became entitled to the lands of Drumsastry, Derrikerb, and Cornavray, in equal shares as tenants in common *quasi* in fee. Declare the Plaintiff, *Edward Crozier*, and the Defendants *Baptist Crozier*, and *Everina Scott*, wife of *Arthur Scott*, to be each entitled to one-twelfth part of the said lands in their own right, and also to one-fifth each of the one-twelfth part of *Mervyn Crozier* deceased. Declare the Defendants, *Jane Crozier* and *Margaret Crozier*, to be entitled to the remaining two-fifths of the said one-twelfth part of said *Mervyn Crozier*. Let the said *Edward Crozier*, *Baptist Crozier*, *Everina Scott*, *Jane Crozier*, and *Margaret Crozier*, be respectively put into possession of their respective shares accordingly by the injunction of the Court. Refer it to the Master to take an account of the rents, issues, and profits of said lands from the date of filing the bill in this cause, and ascertain the proportion of the said several parties therein. And let the Defendant, *John Crozier*, pay the said *Edward Crozier*, *Baptist Crozier*, *Arthur Scott* and *Everina* his wife, *Jane Crozier*, and *Margaret Crozier* their said several proportions of said rents, within one month after same shall have been ascertained by said Master. Declare all the parties, Plaintiffs and Defendants, entitled to their costs in the cause, when taxed and ascertained, out of the said lands, or the future rents and profits thereof in the first instance: and (the parties so consenting), refer it to the Master to appoint a fit and proper person to be receiver of the rents, issues, and profits of the said lands, on his perfecting a recognizance according to the usual course of the Court; liberty to the Master to make a separate report

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as to said receiver. Let the Master make all just allowance in taking said accounts; liberty to the parties to appear to the Court from time to time as there may be occasion.

*Reg. Lib. 87, fol. 142, 1843.*

## SCOTT v. NIXON.

Feb. 6, 8.

The Court will compel a purchaser to take a title depending upon parol evidence of adverse possession under the Statute of Limitations, 3 & 4 Will. IV. c. 27.

A testator, by his last will and testament, after appointing certain lands to his eldest son, George, gave all the residue of his real estate among

his six younger sons, subject to the payment of his debts and some charges. Shortly afterwards he obtained a conveyance of certain freehold property, which was the subject of the controversy in the present suit, and died without having altered in any respect or republished his will, leaving his eldest son of full age.

Upon the death of the testator in 1791, the six younger sons entered into the possession, *inter alia*, of the after-acquired property, and so continued until the present time. George, the eldest son, died in 1819, leaving an infant heir. It did not appear that any claim was ever made on the part of George during his life, or after his death by his heir at law, and the younger sons continued during the entire of such period in the undisturbed enjoyment of the property. In 1839 the premises were sold under a decree of the Court, pronounced in a suit instituted by a judgment creditor of the testator, in which suit the infant heir was a party Defendant. Subsequently to this sale the heir died, and the suit was not revived against the next heir. The abstract of title stated all the above matters, and was verified by two affidavits, deposing as to the fact of the possession and receipt of rent by the younger sons:—*Held*, upon objections to the title on the part of the purchaser, that by the operation of the Statute 3 & 4 Will. IV. c. 27, such a title had been created as the purchaser was bound to take.

By the effect of the Statute, after the proper period of limitation has passed, the legal fee-simple is in the party who has been in possession during that period, and he is competent to convey it to another.

There is no saving of minority given in the fifteenth section of the Statute, and therefore the period of five years given by the section cannot be extended by reason of the infancy of the claimant.

**ALEXANDER NIXON**, by his will, bearing date the 5th of March, 1776, after referring to certain lands which had been the subject of settlement, and appointing same to his eldest son, *George Nixon*, devised the residue of his real estates, after payment of his debts, and some pecuniary legacies, to his executors and their heirs, for the use of his six younger sons, *Adam, Andrew, Montgomery, Thomas, Robert, and James Nixon*, share and share alike, as tenants in common in fee.

Shortly after the date of this will, and in the same year, certain lands and premises called the lands of Mullyard-

logher, and a tenement called *Rea's* tenement, adjoining the town of Enniskillen, and which were held for lives renewable for ever, were purchased by *Alexander Nixon*, and on the 16th of November, 1776, the deed of conveyance was executed, whereby said premises were assigned to the said *Alexander Nixon* and his heirs for ever.

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*Alexander Nixon* died in the month of March, 1791, without having altered in any respect, or republished, his will, leaving his eldest son, the said *George Nixon*, and his six younger sons him surviving.

Upon the decease of their father, his eldest son, who was of full age, entered into the possession of the settled estates, and the younger sons into the receipt of the rents of the rest of the estates of the testator, including the lands of *Mullyardlogher* and *Rea's* tenement.

In 1819 *George Nixon* died, leaving his daughters, *Mary* and *Anna*, his only children, and co-heiresses at law, of whom *Anna* was the survivor, her sister *Mary* having died a minor, intestate, and without issue.

In 1820, the original bill in this cause was filed by *Beresford Burstons*, a judgment creditor of *Alexander Nixon*, for the purpose of raising the amount secured by his judgment. The daughters of *George Nixon*, who were not parties to the original bill, were made parties by an amendment in 1822; and in 1826 a decretal order was pronounced, directing the usual accounts.

In 1835 a bill of revivor and supplement was filed by *Scott*, the assignee of the judgment of the Plaintiff in the original



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cause; and to this bill *Anna*, the surviving daughter of *George Nixon*, was made a party Defendant. She was a minor at the time, and by her answer she claimed to be entitled to one undivided sixth of the property devised by the testator, *Alexander Nixon*, to his six younger sons, as being the heiress at law of one of them, *Robert Nixon*, who had died intestate and without issue; and she submitted her rights generally to the judgment of the Court.

On the 28th of April, 1838, a decree was pronounced for the sale of the property of which *Alexander Nixon*, the testator, was seized and possessed: and on the 24th of April, 1839, the denomination in question, *Rea's* tenement, was sold.

The abstract of title, which was furnished on the part of the Plaintiff, after setting forth the above facts, stated that *Anna Nixon*, having attained her full age, and being about to be married, by deed bearing date the 15th of June, 1840, immediately previously to such marriage, but with the concurrence of her intended husband, *John N. Blake*, assigned her interest in and to her undivided one-sixth of the said premises to the Rev. *Thomas Ovendon*, in order that he might join in making out title, and in a proper deed of conveyance of the said premises and the other lands directed by the decree to be sold.

The abstract further stated, that by the settlement executed on the occasion of the marriage of the said *Anna Nixon* with her husband *John N. Blake*, all her estates therein mentioned were conveyed to trustees upon certain trusts, reserving, however, to herself absolute control over same: and that on the 12th of September, 1841, she died, having by her will directed, that all her estate should remain

vested in the trustees of her marriage settlement, upon the trusts therein specified.

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The abstract further stated, that *George Nixon*, at the period of his father's decease, and for many years afterwards, was a practising barrister, and well acquainted with his own rights, and the manner in which the property was circumstanced: that his younger brothers had entered into the possession of the premises in question with his concurrence, and that he had never questioned the propriety of their thus possessing themselves of said premises, and dealing with them as their own: that these premises formed a part of the property settled upon the occasion of the marriages of some of the brothers: that *George Nixon* was conversant with these facts, and was himself a trustee in the settlement of one of them, *Adam Nixon*.

The purchaser objected to the title to the premises in question, first, on the ground that having been purchased by the testator subsequently to the date of the will, and there having been no republication of said will, they did not pass to the younger children by force of said will; and that no proof was given to sustain the statement, that the younger children had continued ever since the death of their father to receive the rent of the premises in question. Secondly, he insisted that since the death of *Anna Nixon*, there was not before the Court in the cause any person, in whom the legal estate in the premises sold was vested.

The Plaintiff having obtained a reference to the Master in the cause, as to the title to the premises in question, two affidavits were filed in support of the abstract, one by

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*Terence Magavran*, who had acted as bailiff to the ~~premises~~ property; and the other by Mr. *Ralph Scott*, the solicitor for the Plaintiff in the cause.

*Magavran*, in his affidavit, stated that he was upwards of seventy years of age: that he was acquainted with *Alexander Nixon*, and that upon his death in 1791, his younger sons entered into the possession of the lands of Mullyardlogher and *Rea's* tenement; and continued to receive the rent of the same, and to exercise dominion over them, from the day of the decease of their father up to the present time, free from the interference, claim, or demand of any person whatsoever: that he was well acquainted with all the sons of *Alexander Nixon*, having for upwards of fifty years acted as their bailiff, and assisted in managing their estates and collecting their rents, and was in the habit of constant intercourse with them: that *George Nixon* was a practising barrister, and was well acquainted with his own rights and the circumstances of the property: that he lived principally with and amongst his said younger brothers: that Deponent never heard or knew of the said *George Nixon*, or any person on his part, from the death of the said *Alexander Nixon* up to the decease of the said *George Nixon*, ever having claimed any title to the premises in question; and that from the peculiar position in which he was placed, he did not believe it possible that any claim could have been made respecting said lands without his knowledge. The Deponent further stated, that since the death of *George Nixon* he had continued to act as bailiff to the estates of the daughters of *George*, until the surviving daughter *Anna* attained full age, which took place in the year 1838; and that he had never heard that,

during that interval, any claim was made on behalf of said *Anna*, save to one undivided sixth part, to which she became entitled as heiress at law of her uncle, *Robert Nixon*.

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The affidavit of the solicitor, Mr. *Scott*, stated that he had been informed and believed that upon the death of the testator, *Alexander Nixon*, his younger sons took possession of the premises in question, and that they and their devisees or representatives had ever since continued to hold and enjoy the undisturbed possession thereof: that upon the occasion of the respective marriages of *Adam Nixon* and *Andrew Nixon* in 1793, and *Montgomery Nixon* in 1794, each of said younger sons assigned to trustees their one-sixth undivided share of various lands and premises, and, amongst others, of the property in question: that he had been for upwards of thirty years intimately acquainted with the *Nixon* family, and for a great portion of said time had been the law agent of the majority of the family: that he was acquainted with *George Nixon*, who was a practising barrister, and that he never knew or heard that *George Nixon* in any manner, or any person for him or on his behalf, during his life or since his decease, claimed any interest in the premises in question: that *George Nixon* was well aware that the rents of said property were received by his younger brothers for their own use: that in the year 1820 Deponent was appointed agent to collect the rents of part of the property, to which the younger children claimed to be entitled, including the premises in question: that previously thereto the rents of these premises were received by some one of the younger sons, and by them applied for their own use, with the rents of several other lands, in payment of head-rents, renewal fines, interest on judgment debts, and other charges on the property, and

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that no part thereof was given to the said *George Nixon*: that he acted under a power of attorney from the younger sons, and that he was directed by them to apply the rents received out of the premises in question and the other lands, over which he was appointed agent, in payment of renewal fines and head-rents, payable out of the other properties of said younger sons, and in discharge of interest upon judgment debts, which were charges upon the property of the younger sons, but did not affect the property of *George Nixon*. The Deponent further stated that he had in his possession various account-books and memorandums, in the hand-writing of one or other of the younger sons; from which it appeared that they exercised undisputed control over the premises in question, immediately after the decease of their father, and continued to hold it for their own use free from the interference or claim of their eldest brother; and that from the intercourse which subsisted between him and the said *George Nixon* in his life-time, and also with his younger brothers, he did not think it was possible that any claim could have been made to these premises by the said *George Nixon* in his life-time, or by his children since his decease, without his having heard of same.

An account-book of an agent of the family was produced, whereby it appeared that in 1819, twelve years' arrear of rent out of these premises had accrued: but it was also shewn that this arrear had been afterwards paid. In addition to these facts, it was stated that the lease under which the premises were held by the lessees expired in 1841.

The Master, having overruled the purchaser's objections, reported in favour of the title. To this report exceptions were taken on the part of the purchaser. The

case was argued at the Rolls on the 14th of January, 1843, when His Honor was pleased to allow the exceptions.

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From this order the present appeal was brought by the Plaintiff.

Mr. *James Scott* and Mr. *Sproule* in support of the appeal.

Argument.

The question presented for the adjudication of the Court upon this appeal is one of very great general importance; whether the Court will compel a purchaser to take a title depending on the Statute of Limitations, 3 & 4 Will. IV. c. 27? Though there has been no precise decision upon the point, yet, looking at the principle of the Statute, and the several cases, which have hitherto been decided upon its construction, it would seem that there could be no doubt but that a good title could be made under the Statute. By the second section it is provided generally, that no action shall be brought to recover any land or rent, but within twenty years next after the right of the party shall have first accrued; and the succeeding sections point out the different savings, which the legislature has thought proper to adopt in each particular case of disability, thereby defining the time when the right shall be deemed to have first accrued. In the present case, upon the death of the testator, his eldest son was of full age; he was under no disability of any kind; he was a professional man, perfectly acquainted with his rights, and the manner in which the property was circumstanced. He lived until the year 1819, and never made any claim to this property, but permitted his younger brothers to remain in the undisturbed enjoyment of the rents, and in like manner they have so continued since his

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death, no title or demand having been set up or made on the part of his daughter, or by any person on her behalf. In all probability, there existed some contract previous to the date of the testator's will, for the purchase of this very property. If so the will would not be revoked in equity by the subsequent conveyance. At all events there has been an uninterrupted possession shewn in the younger brothers for a period of more than fifty years, without any claim having ever been made during the entire of this period. His Honor seemed to think, that the Statute operated only as a defence, but could not confer a title. The legal title on the abstract, he said, was shewn to be in the heir at law of the testator, the estate not having been subject to the operation of the devise; by what deed, he asked, or at what time, was the legal estate transmitted to the present vendors? Unless, therefore, the heir at law would join in the conveyance, the purchaser would not have a legal title, and the Court could not force such a title on the purchaser. But this reasoning is founded on a misapprehension of the Statute. The former Statutes of Limitation were held only to bar the remedy; the present Statute, on the contrary, bars not only the remedy but the right. It operates as an extinguishment of the remedy and as a transfer of the estate. The thirty-fourth section provides, that after the determination of the period of limitation, the right and title of the party out of possession shall be extinguished. In *The Incorporated Society v. Richards*(a), the proposition is laid down in the clearest terms: "There is a marked distinction," your Lordship says, "between the old Statutes of Limitation and the present one. The former Statutes only barred the remedy, but did not touch

(a) 1 Drury &amp; W. 258, 289.

the right ; possession at all times gave a certain right, but under the new Act, when the remedy is barred, the right and title of the real owner are extinguished, and are in effect transferred to the person whose possession is a bar."

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It is said that the evidence of adverse possession rests upon mere affidavits, taken in the absence of the party interested ; that the fact itself was never suggested upon the pleadings, or in any way proved in the cause. That such is the case is quite true, but it is to be remembered, that the heir was a party in the cause, and never set up any title, but, on the contrary, claimed one-sixth of these very premises, as heiress at law of one of the younger sons ; and as to the affidavits, if the purchaser thought proper, or conceived that the statements in these affidavits could have been disputed, he might have required some more stringent proof. It was attempted to be argued, that as nothing but the receipt of rent from the tenants in possession was shewn, that upon the expiration of the lease in 1841, a new title accrued to the heir. But in this respect also the old rule of law has been altered by the Statute. The receipt of rent is made equivalent to the occupation of the land itself, and by the ninth section it is provided, that no new right shall be deemed to have accrued upon the determination of the lease. How then is it possible that the purchaser's title can be impeached, or his possession invaded ? He will have a title created by an adverse possession against all the world, for a period of more than half a century ; *Ex parte Hasell(a)*. The argument at the other side, in fact, amounts to this, that in no case can a title be made out under the new Statute of Limitations.

(a) 3 Younge & C. 617.



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Mr. Serjeant *Keatinge* and Mr. *Moore*, *contra*, for the purchaser.

The question at present before the Court was never raised upon the pleadings, and is now at discussion in the absence of the party, who is alone concerned in its decision. Where such a title is sought to be enforced, and the rights of a purchaser affected, the facts ought to be solemnly established by formal proof in the cause, and in the presence of the heir, who is interested in disputing them. How can these affidavits, by which it is sought to bind the purchaser, affect the heir? Suppose he were to bring an ejectment against the purchaser, could he not controvert the alleged wrongful receipt of rent, and if he succeeded, could the purchaser use these affidavits in reply? What would then become of the purchaser's title? These affidavits may be false. They may be capable of explanation by matters within the knowledge of the heir at law. But even admitting the facts as stated in the affidavits to the full extent, they do not make out such a case of wrongful claim under the Statute, as is sufficient to create a title. The receipt of rent by the younger sons may have been by the permission of their elder brother, or perhaps as his agent; the case at the other side is that the eldest son, *George Nixon*, was a man of business, and fully acquainted with his rights, and the circumstances of the property. It could not, therefore, have been under a wrongful title, that the younger brothers received the rents; and what still further sustains this supposition, is the manner in which it has been shewn that these rents were applied, namely, in payment of renewal fines, interest on debts, which would have been a good application as against the eldest son. Still further, the receipt of rent was not even uninterrupted; for it appears from the rent book of the agent, Mr. *Scott*, who

appointed in 1820, that there were at that time twelve years' arrear of rent due by the tenants. The Court will pause before it compels a purchaser to take such a title, more especially where the Plaintiff could so easily have filed a bill of replevin against the heir, and established all these facts in the usual way. *George*, the eldest son, died in 1819; he was not legally seized of these premises, his right not having been barred by reason of the outstanding lease, which did not expire until 1841. At his death his heir was a minor, and did not attain her full age until 1838: of course nothing that was then done could affect her rights. In the meantime the Statute passed, for the first time making the receipt of rent by a stranger a bar to the title of the real owner, but at the same time giving, in the fifteenth section, five years to parties, whose rights were taken away by the Statute, to assert them; she or her heir was, therefore, entitled to five years from the time she attained her full age, which was in 1838, to bring her ejectment, and this period is not yet elapsed. In addition to all this, the purchaser is entitled, according to the rule of the Court, to get a legal title. This is what the parties professed to sell, and which, when the purchase was made, there were proper parties before the Court to convey. By the subsequent death of the heir, there is now no one to convey the legal estate to the purchaser, and the Plaintiff asks the Court to compel the purchaser to take a title, not resting upon matter of record, or documents properly attested and proved, but sustained solely by affidavits, which, it must be conceded, would afford no defence to sustain the title in an action of ejectment, and which are open to contradiction or explanation. If even a clear case of adverse possession had been established, it is uncertain whether such a title would

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be enforced against a purchaser(a). It is admitted, that there is no authority to be found upon the point. But here the parties have even not made out that case; and this Court will, in conformity with its well established rule as to doubtful titles, decline to compel a reluctant purchaser to take a title open to so many difficulties and serious objections.

Judgment.

THE LORD CHANCELLOR :—

The question, which has been raised in this case, is one of great importance, and very considerable difficulty. I wish to state what my present impression is. It seems to be admitted that there is no necessity for having the heir at law of the original testator, *Alexander Nixon*, before the Court, except with a view to the present objection. The judgment, on foot of which the bill was filed, bound all the lands, of which the testator was seised; but as the lands, the sale of which was the object of the suit, were charged with the debts in exoneration of other lands devised to the heir, and which he had elected to take, it was not considered necessary to have the heir at law before the Court in the first instance. The case then stands thus: the testator made his will shortly before he acquired the estate in question, and thereby, after devising certain lands in trust, for his eldest son, *George Nixon*, &c., gave all the rest and residue of his real estate among his six younger children, subject to the payment of his debts and certain charges. Shortly afterwards, in 1776, he obtained a conveyance of the property now in controversy. The debt in this case, being a judgment debt of the testator, would

(a) *Cooper v. Emery*, *Hayes' Convey.*, vol. i. p. 274.

any circumstances be a charge upon the property in  
 ion ; for if the property passed under the devise of the  
 e, the judgment was charged by the terms of the will ;  
 it did not pass, still the judgment was a charge upon  
 unds in the hands of the heir. The purchaser under  
 decree therefore would, at all events, have a good  
 ble title, because the decree, which directs the lands  
 sold for the payment of that debt, was made in  
 resence of all the parties interested, and the estate was  
 ch charged with the debt, whether you look to the na-  
 of the debt, or the rights of the parties, if it descended  
 heir, as if it passed under the devise of the residue.  
 decree, therefore, gives an equitable title to the pur-  
 r as much as any decree can ; and if it should turn out  
 here had been a pre-existing contract for the purchase  
 se premises, then I apprehend that the purchaser  
 l have a good equitable title under the younger child-  
 o whom the property would pass by force of the will,  
 s there was something in the frame of the conveyance to  
 nt this, the introduction of a different set of limitations,  
 stance : this, however, is a very subtle doctrine, and  
 e fact of such previous contract has not been proved,  
 unnecessary to dwell more upon it. I shall, therefore,  
 se that the acquisition was altogether subsequent to  
 ate of the will.

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ie first objection raised on the part of the purchaser is,  
 the question, whether or not this property passed  
 r the will, the question, in fact, of adverse possession,  
 which the Plaintiff now relies, is not raised by the  
 ings, or put in issue in the cause. I cannot admit  
 objection. The estate was, under any view of the case,  
 ct to the Plaintiff's charge, and being so, a purchaser

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*Judgment.*

could never, in this Court, be permitted to object that one denomination of lands, equally liable with others to a debt, was sold in preference to another. Therefore, there is a good equitable title, which can be conveyed to the purchaser in any event. It is then said that the title does not depend upon a matter of record, but rests altogether upon mere affidavits, and I am asked, if the heir at law were to bring an ejectment within ten days after the purchase, whether these affidavits could afford the purchaser any defence? I must say, certainly not. The affidavits here would in a court of law be waste paper. But this Court is frequently obliged to act upon facts making out a title, which have been proved by affidavit, which constitute a title only in this Court. But if the party had chosen to have a more solemn mode of establishing these facts, he could have required it. The purchaser was not bound to accept the affidavits in proof of these facts. He might have insisted upon having a regular examination of witnesses, in the usual manner in which any other question of fact is proved in the Master's Office. The mode of proof therefore in this case rests entirely on the purchaser's consent. Courts of Equity frequently compel an acceptance of a title resting on affidavits; for instance, on questions of identity: the Court must, of course, in such cases, act with great caution, and ought to be satisfied, before it compels a party to take such a title, that the facts as proved are such as to sustain the title, in the event of any adverse claim being set up.

In this case there is really nothing in controversy. There are no conflicting statements; everything has been proved (and there has been no attempt at denial), by the agent, and by a person, who appears to have acted as a bailiff

to the family. It appears, that on the death of the testator in 1791, his six younger children entered into possession of the premises, and so continued until the death of the eldest son, *George*, in 1819, and in like manner have remained in the undisturbed enjoyment of these premises, until the present time ; undisturbed, I mean, so far as any claim on the part of *George's* heir at law is concerned. Some comments have been made upon one of the documents in this case. It is said that there has been no such receipt of rent as is sufficient to give a title under the Statute. But the Act itself puts an end to any difficulty on this point. Under the old law no man, by mere wrong, could acquire a right. A receipt of rent was no ouster. There was, besides, no divesting of estate, the remedy was barred, but not the right to the estate. The late Act professed to deal with such cases, and it provided, that the wrongful receipt of rent should be deemed equivalent to actual possession of the estate. It was urged, that there was not here such a continued receipt of rent, for that the agent, *Mr. Scott*, in 1821, recovered an arrear of rent from some of the tenants, for twelve years I think ; but this amounts to nothing. The parties went into possession in 1791, and remained in the undisturbed enjoyment until the death of the eldest son in 1819. There was a receipt of rent for all this period. The circumstance, that some of the tenants fell into arrear, and that their rents were permitted to lie unpaid for a number of years, the whole of which arrear was subsequently paid, cannot make any difference ; the Statute did not mean a compulsory half-yearly payment of rent, one half-year within the other, it looked only to a regularly continued possession. The question under the Statute is, by whom was the rent received, and in what character ? The fact here is proved, that the rent was received from the

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*Judgment.*

death of the testator by the parties, who were not entitled to it, with the knowledge of the party who was entitled, and who was of full age and acquainted with his rights. I cannot, therefore, but think, that in this case there has been a sufficient receipt of rent within the Statute to create a title.

It was said, that for aught that appears, the eldest son might have permitted the rent to be received by his younger brothers, and that in such case there would be no wrongful receipt, and, therefore, no adverse possession. But to this I cannot accede. The new Statute is so singularly framed, that this difficulty flows from it. Suppose a man to enter into possession by permission of the true owner, and without payment of rent, and to give an acknowledgement in writing of the title; from that moment the possession becomes adverse, and time begins to run, and instead of the real owner having an admission of title, upon which he may rest, the effect is the very reverse; the adverse possession, in fact, commences, and the Statute begins to run. In such cases, therefore, where the operation of the Statute is so powerful, parties must be careful to get such new acknowledgments, from time to time, as will admit their title, and thus preserve the right. In this case there is no reason whatever for supposing that the rent was received by the permission, or with the assent, of the eldest son. There is nothing in the case to lead me to say, that the receipt of rent by the younger children was a receipt by the heir at law himself, for to this length the argument must be pushed. I observe that actual conveyances of parts of the property have been from time to time made by those younger children, and these appear upon the abstract, thus proving a clear adverse possession, and excluding anything like a presumption in

favour of the eldest son: even looking at the Act itself, it will be seen that there is no exception in it of a possession by permission of the right owner. The case, then, is reduced to a simple question of law, can this Court compel a purchaser to take a title depending upon parol evidence of adverse possession, under the new Statute? Under the old Statute it was long undecided whether a purchaser could be forced to take such a title, but ultimately it was so determined, and I apprehend, that it was quite settled, that a clear title, and just as good as any other title, might be acquired by adverse possession, and that a purchaser would be bound to take such a title. Then came the new Statute, which intended to put the title upon higher, certainly not upon lower, grounds. I have heard nothing to displace the observation which has been made, that that Statute does not operate by a mere bar of the remedy, that it does not work so imperfectly, it bars the estate itself; and if so where can the right be but in the person, whose possession the Statute prevents from being interrupted. I am clearly of opinion, that by the effect of the Statute, after the proper period of limitation has passed, the legal fee-simple is in the party, who has been in possession during that period, and that he is competent to convey it to another.

It was attempted to bring the case within the fifteenth section, for that, supposing the possession was not adverse at the death of *George*, the eldest son, as his heiress at law was a minor at such period, she would have had five years to institute proceedings, from the time she attained her full age. But there is no saving of minority in this section. My impression is, that whenever the right is barred by time, a good title can be made; that the party in possession has the legal fee simple, and the purchaser will be bound to take such title. I have stated my general views upon

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the question, but considering its very general importance, I mean to look into the case with great care, before I finally dispose of it, and I should wish to have abstract of title and copies of the two affidavits, and of the original bill.

Feb. 8. THE LORD CHANCELLOR :—

I am not surprised at the conclusion that was come to in the Court below, there having been already two bills filed, to each of which the heir at law of the original testator was made a party Defendant, but no claim was set up by the heir to the lands now in question, and as a bill of revivor could have been easily filed, for the purpose of bringing the present heir at law before the Court, such a course would have removed all difficulty. I should be inclined to agree with this view, were it not that I should then be obliged to decide, that the concurrence of the heir at law was necessary to give effect to the conveyance to the purchaser.

What then is this law of this Court on questions of this kind? The Court has to consider, first, whether *de facto* a title has been made out, and secondly, whether there is sufficient evidence of title to satisfy the Court, before it obliges an unwilling purchaser to accept the title. With regard to the first, it is a matter of perfect indifference how the title is made out, provided the purchaser gets a title, whether it be by escheat, abatement, disseisin, intrusion, or possession and non-claim, or destruction of contingent remainders, is a matter of no consequence, provided there be a valid legal title; whether the evidence is sufficient is a different question. It was said in this case, that the Statute of Limitations only operated as a defence, but never

could be held to confer a title, and I was asked, where, or in whom, was the legal title? I reply, that the Statute has executed a conveyance to the party, whose possession is a bar. The Statute makes the title, for by its operation it extinguishes the right of the one party, and gives legal force and validity to the title of the other, the party in possession. What does the purchaser require in this case? That the heir at law of the original testator should join in the conveyance to him, in order to release any right he may have, by way of extinguishment; but the Statute has, by its own force, not only extinguished any right which the heir could have had, but has transferred the legal fee simple to the party in possession, for the legal estate must be in him, whose possession has barred the right of every other person.

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v.  
NIXON.  
*Judgment.*

Try the case by this test. Suppose the estate in the possession of the purchaser. I ask, would it not have all the incidents which belong to a fee simple? Could not the purchaser deal with it just as he pleased? He could make a lease, execute a settlement, grant a mortgage, sell the fee, or dispose of it by his will. If he died intestate, it would descend as real estate. He might maintain an ejectment against all the world; against the very claimant, whose estate the property originally had been. His title, therefore, is a fee simple in possession. I entertain no doubt upon the point, though, from that deference which is justly due to the opinion of His Honor, and the importance of the question, I have been led to consider it with the greatest care.

As regards this particular title, nothing can be stronger. It does not depend on the affidavits alone, although they are conclusive as to the continued receipt of rent, and by the

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*Judgment.*

Statute, the receipt of rent is put on the same footing with possession ; but I find from the abstract, that there have been conveyances executed by the younger children of portions of this property, in some of which the heiress at law joined as representing a trustee, and by a deed of the month of June, 1840, she conveyed her one-sixth of this very denomination, to which she became entitled in consequence of the death of one of the sons, intestate and without issue. This title, therefore, rests upon actual conveyance, and I think this is a case, in which a jury would be directed to presume a conveyance from the heir at law, in order to give validity to the will of the original testator. If then there were no other grounds, I think I should be fully borne out in saying, that the title would be in this way supported. But it is not necessary to resort to this ground, for I am clearly of opinion, that this title has been sustained upon the first ground. It is in vain to seek to apply the rule as to doubtful titles to this case. The Court must deal with difficulties of title. It is every day required to decide upon difficulties of conveyance, and the construction of complicated limitations, and although it is quite true, that a purchaser will never be compelled to take a doubtful title, still the Court must decide, whether the doubt is of such a nature as may expose the purchaser to the probability of litigation and consequent danger. In this case I have the satisfaction of knowing, that the purchaser cannot incur the slightest risk ; his equitable title is complete, for the Plaintiff's right bound the estate in the hands of all parties, and the heir at law was before the Court at the time of the sale. A better equitable title there could not be ; but the purchaser is not bound to take an equitable title. My opinion, however, is, that the title has been, by the operation of the Statute, clothed with the legal estate, and therefore that he is bound to take it.

HOGG v. GARRETT.

1843 .

Feb. 6.

IN this case a question had arisen as to the effect of the death of a Bishop upon a writ of sequestration. At the original hearing, on the 10th of February, 1842, the Court had directed a case to be submitted to the Court of Queen's Bench, upon the point.

Practice as to settling a case involving a question of Ecclesiastical Law.

The decretal order, after providing that in the event of the parties differing in respect to the frame of the case, it should be referred to the Master to settle same, contained the following clause: "and let the Master, in settling the said case, have the usual authority given to him, as in the general decrees to account, the better to enable him to state the said case according to the facts."

The Master having, on the application of the Plaintiffs, made an order on the 24th of January, 1843, that they should be at liberty to examine, in relation to the case, as to any facts which might be necessary; and the Plaintiffs having given notice of their intention of examining the Registrar of the Consistorial Court of Dublin, as to the practice in the Ecclesiastical Court, with respect to pending sequestrations, on the death or translation of a Bishop, an application was made on the part of two of the Defendants, that the said order should be set aside, and that the Master should be directed to settle and approve of the case directed by the decree, without having recourse to any further evidence than what had been already given in the cause.

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Mr. Moore and Mr. J. G. Holmes, in support of the motion, contended that the object contemplated by the

*Argument.*

1843.

Hogg

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*Argument.*

proposed examination was directly at variance with the intention of the Court, when it directed the case.

Mr. *William Brooke* and Mr. *Gayer* for the Plaintiffs, submitted, that the object in view was perfectly legitimate, to have the practice of the Ecclesiastical Court ascertained for the Court of Law. The practice of the Ecclesiastical Court was a matter of fact, to be proved by evidence, *Beaurain v. Scott*(a); and such an inquiry was not unusual. In *Fowler v. Richards*(b), Sir *John Leach* directed an inquiry to be made as to the practice and doctrine of the Ecclesiastical Courts, on the subject of the case then before him.

*Judgment.*

THE LORD CHANCELLOR made an order, that the parties should be at liberty to obtain the opinion of two civilians in London, and also of two civilians in Ireland, as to the practice in each country, and that their certificates should be referred to in the case; with liberty to either party to make use of such certificates in argument on the case.

*Reg. Lib.* 1843, fol. 169.

(a) 3 Campb. 388.

(b) 5 Russ. 39.

# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## HIGH COURT OF CHANCERY.

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O'CONNELL v. M'NAMARA.

1843.

Jan. 26.

BY a certain indenture of settlement, bearing date the 1st of July, 1777, and executed on the occasion of the marriage of *Thady M'Namara* and *Elizabeth* his wife, a sum of 3000*l.* was provided for the younger children of the marriage. *John M'Namara*, as one of such younger children, became entitled to one-fourth of said sum, amounting to 750*l.*; and by a certain decree bearing date the 14th of December, 1814, and made in the cause of *Cox v. M'Namara*, a sum of 950*l.* 1*s.* 2*d.*, being the amount then due for principal and interest upon the said sum of 750*l.*, was declared to be well charged upon the several lands and premises comprised in the settlement of the 1st of July, 1777, and was decreed to be paid, with interest until paid.

A party seeking to have the benefit of a former decree, must be prepared to shew that such decree is right; for the Court will not carry the decree, if it appear to be erroneous, into execution.

In this case a decree of 1814 declared the consolidated sum, for principal and interest, upon foot of a portion provided by settlement for younger children, to be well charged upon

the lands in the decree mentioned: and directed the interest to be thenceforth calculated upon this consolidated sum. Upon a bill filed by the Plaintiff, in whom this charge had become vested, the Court refused to give him the benefit of the decree, unless he consented to waive his claim to interest on the consolidated sum.

1843.  
 O'CONNELL  
 v.  
 M'NAMARA.  
 Statement.

The rights of *John M'Namara* having become subsequently vested in the Plaintiff in this cause, he filed the present bill, praying that he might be declared and entitled to the benefit of the decree of 1814, and for payment of the sum due on foot of his charge and the said decree.

*Argument.*

Mr. *James O'Brien*, on the part of the Defendant, submitted, that the decree of 1814 was erroneous in directing interest to be calculated upon the consolidated sum; and that the Court ought not to carry into execution such an erroneous decree; and cited *Hamilton v. Houghton* (a), *Burke v. O'Malley* (b), and *West v. Skip* (c).

The *Solicitor-General* and Mr. *Monahan*, for the Plaintiff.

*Judgment.* THE LORD CHANCELLOR :—

I do not understand the rule to be, that this Court is bound to carry into execution an erroneous decree: on the contrary, I apprehend, that when a party comes into this Court, asking for the benefit of a former decree, he must be prepared to shew, if the case requires it, that such decree was right. In *Hamilton v. Houghton* the error lay in the original decree of 1780; the appeal in that case, however, was only against the decree which carried that original decree into execution; but there was no appeal from the original decree itself. Lord *Eldon*, in moving judgment, observed, "that the original decree

(a) 2 Bligh, O. S. 169.

(c) 1 Ves. Sen. 239, 241.

(b) 1 Beatty, 96, 121.

appeared to be one, the benefit of which could not be had in that suit;" and he concluded by saying, that "under the circumstances of this case, it appears to me, that we can do no more than displace all those decrees, with liberty to the party to go before the Court again, and amend these pleadings, if he shall be so advised:" and accordingly the cause was remitted back to the Court of Exchequer, with an order to that effect. It is true that as this case now comes before the Court, I cannot order the decree to be amended; but as I am not bound to carry on or perpetuate error, I will not give the Plaintiff the benefit of the former proceedings, unless he consents to take the proper decree.

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v.  
M'NAMARA.  
Judgment.

The decree accordingly declared the Plaintiff entitled to the benefit of the decree in the pleadings in this cause mentioned to bear date the 14th of December, 1814, and which was pronounced in the cause formerly pending in this Court, wherein *Maria Cox* was Plaintiff, and *Thady M'Namara* and others were Defendants, save so far as the said decree gives interest on the consolidated sum of 950*l.* 1*s.* 2*d.*; and let interest on the sum of 750*l.* hereinafter mentioned, be computed at 5*l.* per cent. only: &c. &c.

Decree.

*Reg. Lib.* 87, fol. 162, 1843.



1843.

Jan. 30, 31.

Feb. 2.

A lessee covenanted, during the continuance of the demise, not to raise or extend a certain building, under the penalty of double the yearly rent reserved in the lease, the same to be recovered by distress or otherwise, in the same manner as the said yearly rent:—  
*Held*, that this double rent was in the nature of liquidated damages for a breach of the covenant, and not a penalty, properly so called.

This Court will not, in case of alleged acquiescence, act on light grounds against the legal rights of parties; there must be either fraud, or such acquiescence, as, in the view of this Court, would make it a fraud afterwards to insist upon the legal right.

The rule, which affects a party with notice, where his solicitor has had notice in

the same transaction, or so recently that it is impossible to suppose he could have forgotten it, is in itself sound, but should not be carried too far.

GERRARD *v.* O'REILLY.

*THOMAS GERRARD*, the Plaintiff's father, and *Christopher Cusack*, being seised, the former of the lands, mill, kilns, and weirs of Liscarton, situated on the right bank of the river Blackwater, with half the bed of said river; and the latter, of the lands of Ratheldron, which lay on the left bank, with the other half of the bed of the river: by indenture bearing date the 21st of October, 1821, the said *Thomas Gerrard* demised the said mill and weirs of Liscarton, and his half of the bed of the river, to *Christopher Cusack*, for three lives, or thirty-one years, to be computed from the year 1817, whichever of said terms should last the longer.

At the time of this demise, and for many years previously, there had been a natural island in the river, which ran along the tail-race, and past the head-race of the mill, against the current diagonally: this island was continued by a stone weir, till it reached the centre of the river, a distance of about five yards; and from the extremity of the stone work, at right angles to it, a temporary wicker weir was extended across the river to the Ratheldron bank, leaving the water free to flow down to the mill, between the island, and the Liscarton, or right bank. At the distance of half a mile above the mill, a stream named the Donagh, flowed into the Blackwater, intersecting the left bank, and separating the lands of Ratheldron from those of Mullahard, which were the property of a person named *White*.

In 1828 *Christopher Cusack* died, having, by his will, appointed his widow, *Maria Anne Cusack*, his executrix and residuary legatee.

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 v.  
 O'REILLY.  
 Statement.

By indenture, bearing date the 10th of June, 1829, *Maria Anne Cusack*, conceiving herself entitled to all *Christopher Cusack's* interest in the lease of 1821, affected to sub-let the premises comprised in that lease to *William Gerrard*, the Plaintiff in the present cause. This indenture was expressed to be a demise for the term and subject to the rents and covenants of the lease of 1835 subsequently mentioned.

*William Gerrard* entered into possession under this instrument; and in 1830, expended a sum of 2000*l.* in converting the temporary weir above mentioned, into one of a more permanent character, strengthened with stone piers.

In 1835 it was discovered, that *Maria Anne Cusack* had not any title enabling her to grant the lease of 1829, and that *Marcella Cusack*, the sister of the testator *Christopher Cusack*, was entitled to one moiety absolutely, and to the other moiety for her life, with remainder to *Richard* and *Adelaide Kearney*. *Marcella Cusack*, and the *Kearneys*, considering the expenditure of *William Gerrard*, agreed to grant him a lease upon the same terms as those contained in the void lease of 1829; and accordingly, by indenture dated the 4th of March, 1835, made between *Maria Anne Cusack* of the first part, *Marcella Cusack*, *Richard Kearney*, and *Adelaide Kearney* of the second part, *Thomas Gerrard* of the third part, and *William Gerrard* of the fourth part; after certain recitals, it was witnessed, that the said *Marcella Cusack*, *Richard* and

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 —  
 Statement.

*Adelaide Kearney*, demised the said premises to *William Gerrard* for sixty-one years, from the 1st of November, 1828, at the rent of 80*l.* per annum. And by this deed, *William Gerrard* covenanted as follows, viz.(a): "That he the said *W. Gerrard*, his executors, administrators, or assigns, shall not, during the continuance of this demise, extend, raise, or cause, or permit to be extended or raised, the stone weir now erected on the River Blackwater, leading to the said mill, under the penalty of double the yearly rent hereinbefore reserved, to be recovered by distress or otherwise, in the same manner as the said yearly rent. And it is hereby further covenanted and agreed upon, by and between the said parties hereto, that it shall and may be lawful to and for the said *W. Gerrard*, his executors, administrators, or assigns, to erect, or cause to be erected, whenever he or they may see occasion so to do, a temporary wicker weir, from the extremity of said stone pier in the centre of said river, to reach to the bank or ground on the lands of Ratheldron, on the opposite side from said mill; and shall and may from time to time, and all times hereafter during the continuance of this demise, repair and keep up such temporary or wicker weir, if he or they shall think proper so to do, and at his and their own proper risk and peril, for any damage, which may or shall be occasioned by throwing back water, or otherwise injuring said lands of Ratheldron, or any other lands." And the indenture then proceeded thus: "And whereas, since the execution of the said lease of the 18th of June, 1829, the said *William Gerrard* has erected, or caused to be erected, a temporary or wicker weir from the extremity of said stone weir,

(a) These covenants were copied from counsel's briefs, as the editors were unable to see the deeds.

in the centre of said river, to the said lands of Ratheldron, on the opposite side of said mill ; and whereas, it is alleged, that the said temporary or wicker weir, from time to time, has damaged and injured the lands of Ratheldron, and also the lands of Mullahard, and other lands : now the said *William Gerrard*, hereby for himself, &c., covenants and agrees to and with the said *Marcella Cusack*, *Richard Kearney*, and *Adelaide Kearney*, &c., to be responsible for any risk, damage, or injury, which may already have been done, or may hereafter occur to the said lands of Ratheldron, or Mullahard, or said other lands, by the temporary or wicker weir, which hereafter may be erected, or be caused to be erected by the said *William Gerrard*, his heirs, &c., from the extremity of said stone weir to the said lands of Ratheldron." This lease was prepared by solicitors named Messrs. *Young* and *O'Reilly*.

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GERRARD

v.  
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Statement.

*Christopher Cusack* was largely indebted at the time of his death, and shortly afterwards one of his creditors, named *John S. Blount*, filed a bill for a sale of his estate, and *John Ball* was appointed receiver over the lands of Ratheldron. In this cause *Fleming P. O'Reilly* (the present Defendant) came in as a judgment creditor, and proved his demand before the Master ; Messrs. *Young* and *O'Reilly* acted as his solicitors.

*John Ball*, the receiver, in 1836 submitted a statement of facts to the Master. This statement set forth, amongst other things, the leases above mentioned, and alleged, that in 1830, or 1831, *William Gerrard* had built a stone weir, three or four feet high, across the entire bed of the river, whereby the lands of Ratheldron were greatly injured by floods, and the receiver proposed under these circum-

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stances, that a surveyor should be directed to investigate the cause of the floods, and that a case should be laid before counsel to obtain advice as to the proceedings which should be taken for redress. The Master, however, declined to direct any proceedings against *William Gerrard*, without an order of the Court. It appeared, that this statement was prepared by Messrs. *Young* and *O'Reilly*, who were solicitors for the receiver.

In Hilary Term, 1837, Mr. *White* brought an action on the case against *William Gerrard*, for alleged damages, by reason of the overflowing of the lands of Mullahard, then in his occupation. *Young* and *O'Reilly* were *White's* attorneys in this case.

Pending this action, *Young* was appointed receiver in the room of *J. Ball*, and made an application at the Rolls, founded on the statement of facts above mentioned. Upon this motion His Honor made no rule, *William Gerrard's* solicitor stating, that the same question was involved in the cause of *White v. Gerrard*.

The case of *White v. Gerrard* was tried at the Spring Assizes in 1837, and a verdict was found for the Defendant, the jury being of opinion, that the injury was not occasioned by the weir, but by natural causes, viz., a shoal in the river, and certain windings in its banks. However, a new trial was directed, but, by consent, the case was referred to three eminent engineers, to ascertain and determine, how the injury done by the weir, if any, could be remedied. On the 30th of August in the same year, the engineers made their unanimous award, and thereby directed, that a channel should be cut through the shoal,

that the then existing weir should be removed, and in lieu thereof, a new stone weir, of a certain length and description, erected, and new sluices constructed. Upon this award being published, *William Gerrard* caused it to be served on all the parties in the cause of *Blount v. Cusack*, and accompanied it with a notice, in which he stated, that his object in serving the award was to have the permission of all persons interested in the matter, to carry on the works mentioned and recommended in the award. The award was not served on the receiver in the cause.

1843.  
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 GERRARD  
 v.  
 O'REILLY.  
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 Statement.

On the 7th of June, 1838, the lands of Ratheldron, and all *Christopher Cusack's* interest in the mills of Liscarton, were sold in the cause of *Blount v. Cusack*. The rental and particulars of sale did not contain any reference to the award(a). *Fleming P. O'Reilly* became the purchaser. Objections were, however, taken to the title, but not being overruled until July, 1839, the sale was not confirmed, nor the conveyance executed, until some time in the year 1840.

It appeared that in July, 1838, *F. P. O'Reilly* went to see the purchased lands; that on that occasion he saw *William Gerrard's* men on the Ratheldron bank, engaged in the execution of the works directed by the award, and that he did not make any objection. It also appeared, that a conversation took place in the year 1838, between the receiver in *Blount v. Cusack* and *Samuel Gerrard*, a brother of *William Gerrard*, in which the receiver said laughing, "That is a very fine weir you are building; we will be going down some fine morning to throw it down;" to

(a) The rent payable by *William Gerrard* was stated to be 80*l.* per annum.

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Statement.

which *Samuel Gerrard* replied, "If you attempt it we will give you a cold bath in the river; however, the worst you can do will be to bring an action for the double rent, and we have the advice of counsel, that we shall not incur that liability." It further appeared, that *F. P. O'Reilly* had cautioned the receiver not to accept the single rent; but that the Master had directed the receiver to take it, inserting in the receipt these words, "without prejudice to the purchaser's claim for double rent." This receipt *William Gerrard* declined to accept.

In Hilary Term, 1842, *Fleming P. O'Reilly* commenced an action of covenant against *William Gerrard*, whereupon the present bill was filed by the Defendant against the Plaintiff at law. The bill prayed, that the Plaintiff might be declared entitled to hold the premises comprised in the lease of 1835, at the single rent therein reserved: or that an issue might be directed to try whether any injury had been done to the Defendant, *F. P. O'Reilly*, by the extension of the Liscarton weir, and, if any, what was the amount of such injury; and that upon payment of that amount with the single rent, the Plaintiff should be declared entitled to hold the premises in their present state: or that the Plaintiff should be declared entitled to enter and remove the said weir, and erect a wicker weir in place thereof, and upon payment of the penal rent mentioned in the lease of 1835, up to the time of such removal, to hold the premises subject only to said single rent, and for an injunction to restrain the proceedings at law.

The injunction was granted upon an application to the

Master of the Rolls, and was subsequently continued to the hearing, which now came on.

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Mr. *Moore*, Mr. *Wm. Brooke*, and Mr. *Battersby*, for the Plaintiff.

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M. Serjeant *Warren* and Mr. *Francis Ball* for the Defendant.

Mr. *Battersby* in reply.

The Plaintiff is entitled to relief, firstly, because the double rent is reserved expressly as "penalty," and not as liquidated damages. Secondly, because this is the case of a collateral object secured by a penalty. Thirdly, because the Plaintiff purchased, by the award and outlay in execution of it, liberty to do the act, and to this award the owners of the reversion, now represented by the Defendant, were at the time, impliedly at least, parties. And, fourthly, because the Defendant himself had express notice of the work being commenced for his benefit; he saw it in progress and acquiesced in it, he has reaped the advantage of it, and to demand the penalty in addition, is to attempt a fraud. Now, in such a case, whatever be the words of the contract, if the sum reserved is manifestly inserted to deter from the doing of an act, and is not an agreement estimating the enjoyment of the property at different rates, according to different circumstances, as the act be done or not, it is a penalty, and the Legislature has struggled, as well as the Courts of Law and Equity, against giving more than the value of the actual damage, resulting from the doing of the act; and the question, whether the sum reserved is to be considered a penalty or liquidated damages, in all cases depends upon the in-



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tention of the parties, which, it is agreed, was in this case to prevent injury to the lands of Ratheldron, without regard to those of Liscarton, and merely to secure that, a collateral object. The case of *Carden v. Butler*(a), which has been approved of by your Lordship in *French v. Macale*(b), is an authority directly in point. There an injunction was asked to restrain the Defendant from planting potatoes in a meadow, which had been already turned up by lawless persons, contrary to the Defendant's will. The motion was opposed on the ground that the sum reserved was in the nature of liquidated damages, and that the Defendant had a right to do the act, if he chose to pay the price. The covenant was, that the lessee should not, on any pretext, without the consent of the lessor, plough or dig any part of the demised premises under a penalty of five pounds for each acre, which the lessee should plough, &c.; Chief Baron *Joy* said, "we are all of opinion, that this is the case of a penalty properly so called, and not a case of liquidated damages." So in *French v. Macale*(b) the covenant was, that the Defendant should not burn the demised premises, under the penalty of 10*l.* per acre, to be recovered as the reserved yearly rent for every acre so burned; the Court held, that the intention of the parties was to prevent the act, and therefore continued the injunction, although the Defendant insisted that the increased rent was by way of liquidated damages. These cases shew that such covenants are in the nature of agreements to be specifically performed, and governed by the intention of the parties, which, in this instance, was to prevent the floods on Mulahard and Ratheldron, as recited in the leases of 1829

(a) *Hayes & J.* 112.(b) 2 *Drury & W.* 269.

and 1835, an object, which was effected by the works now complained of, and for the purpose of having which executed, the owners of these lands respectively joined in the arbitration and award: Mr. *W. White*, the owner of Mullahard, executed the submission; *Young*, the receiver over Ratheldron, with *Hugh O'Reilly*, his partner, the son and solicitor of the present Defendant, signed the submission as attorneys of *White*, and made the award a rule of Court. The Defendant himself was aware of the whole transaction, saw the work, purchased with that knowledge, and has the advantage of the Plaintiff's expenditure; he now says, he lay by intending to have the penalty also. This is not equitable. The Legislature saw the injustice of enforcing such penalties, and passed the Statute 9 Will. III.(a) expressly to prevent the necessity of parties having recourse to Courts of Equity for relief, enacting that they may assign breaches of bonds conditioned for performance of covenants. Courts of Law, to advance the remedy, construe that "may," *must*(b), and will not permit more than the actual damage to be recovered. On the same principle, in *Kemble v. Farren*(c), where the Defendant agreed to act and conform in all things to the rules of the theatre, &c. and the Plaintiff agreed to pay him 3*l.* 6*s.* 8*d.* every night; and if either party should neglect or refuse to fulfil the said engagement, or any part thereof, or any stipulation therein contained, such party should pay the other 1000*l.*, to which sum it was thereby agreed that the damages sustained by any such omission, &c. should amount, and which sum was thereby declared by the parties to be liquidated and ascertained damages, and not a penalty, Chief Justice *Tindal* said, "it is un

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(a) Chap. 10, sec. 8.

(c) 6 Bing. 141; 7 Bing. 83.

(b) 1 Saund. 58.

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doubtedly difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of 1000*l.* should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty, or in the nature thereof. If, on the one hand, the Plaintiff had neglected to make a single payment of 3*l.* 6*s.* 8*d.* per day, or, on the other hand, the Defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of 1000*l.*" The case is precisely that in which Courts of Equity have always relieved, and against which Courts of Law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by breach of the agreement. It is the peculiar province of equity to moderate the rigour of the common law with respect to such penalties; thus, in *Benson v. Gibson*(a), 100*l.* was deposited by the Plaintiff with the Defendant, to insure the due performance of an agreement for the Plaintiff's services during a certain period in Flanders in buying hair for him. The Plaintiff did not duly perform his contract, but filed a bill for the deposit and wages. Lord *Hardwicke* said, "I cannot decree this penalty here, because this is a bond for services only, and different from a *nomine pænæ* in leases, to prevent a tenant from ploughing, because that is the stated damages between the parties. Here I cannot decree the penalty, but must direct an action at law upon a *quantum damnificatus*, to try how far the Defendant has been injured by the Plaintiff's non-performance of the service." In *Hardy v. Martin*(b),

(a) 3 Atk. 395.

(b) 1 Cox, 26.

the Plaintiff and Defendant being brandy merchants, on a dissolution of partnership the former quitted business, sold his lease and shop to the Defendant, and gave his bond in 600*l.*, conditioned not to sell brandy, &c. within London or Westminster, or five miles thereof. An action was afterwards brought for the penalty, and on a bill filed, an injunction was granted. The penalty in all such cases is only security for the actual damage: *Harrison v. Wright*(a), *Wilbeam v. Ashton*(b), *Charrington v. Laing*(c), *Davies v. Penton*(d), *Smith v. Dickenson*(e), *Boys v. Ansell*(f).

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The enjoyment of Ratheldron being only a collateral object as regards the reversion of Liscarton, in right of which the Defendant has brought his action, he is only entitled to seek compensation for an injury, if any, done to that reversion, and as it has been proved that no injury has been sustained, he cannot have any compensation; thus in *Sloman v. Walter*(g), the Plaintiff and Defendant, being partners in the Chapter coffee-house, agreed that the former should conduct the business, and that the latter should have the use of a particular room. There was a bond to fulfil this agreement: a breach, action, and bill praying an issue of *quantum damnificatus*, and an injunction. Lord *Thurlow* said, "the rule, that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessorial, and therefore only to secure the damage really incurred, is too strongly established in equity to be shaken: this case is

(a) 13 East, 343.

(e) 3 Bos. & P. 630.

(b) 1 Camp. 78.

(f) 5 Bing. N. C. 390; 7 Scott, 364.

(c) 6 Bing. 242; 3 Moore & P. 55. (g) 1 Bro. C. C. 418.

(d) 6 Barn. & C. 216.

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to be considered in that light." In *Astley v. Weldon*<sup>(a)</sup> an agreement was made to perform at a theatre, with fines for late attendances, &c.; either party failing to pay to the other the sum of 200*l*. The Court held this to be a penalty. Here if the Court have any doubt that no injury has been done, we pray an issue. The lease providing that the Plaintiff should be responsible for any injury to neighbouring lands by extending or raising his weirs, shews that the object was to prevent his doing so altogether, on the supposition that it would be injurious; but if on payment of double rent he might do as he pleased, he would incur the same penalty whether he raised it twenty feet, and flooded all Ratheldron, or only the twentieth part of an inch, and did no mischief. The attempt of the Defendant is a palpable fraud; so early as 1836 it appears in evidence that the receiver over Ratheldron complained of floods, and brought the matter under the cognizance of the Master in the cause, and the Master of the Rolls postponed the subject, until the result of *White's* action should be seen, rightly judging, that as his lands were farther from the weir, his was an *à fortiori* case; but the question is the same; thus at that time, and before and afterwards, the owners of both townlands made a common cause. The action comes to be tried, and the receiver over Ratheldron is attorney for *White* in the action, and the solicitor of the present Defendant, as regarded his claim upon Ratheldron, being a reported creditor; and then, with the knowledge of all parties, it is referred to three eminent engineers, to direct what shall be done to the river for the benefit of all the adjoining lands; these gentlemen make their award, and direct an act to be done, which would be for the be-

(a) 2 Bos. & P. 346.

nefit of all, but a breach of the Plaintiff's covenant; before, however, the Plaintiff performs it, he serves a copy of that award upon all the parties who at the time had any estate either in Ratheldron or Liscarton, with a notice of his intention to act on it, and requiring the approbation of all parties interested.

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Under these circumstances the Defendant, in June, 1838, before the award was executed, but during the progress of the work, in presence of the receiver, who was his own solicitor in the cause in which the sale took place, purchased, subject to a rent of 80*l.*; no other rent was stated, either in the rental, or at the time of sale; the covenant was already broken, and the award in progress of execution, so that if the double rent was ever to be paid, it was then payable, and the receiver and Defendant either were guilty of gross fraud, the one in selling, the other in buying at a rent of 80*l.* only, when 160*l.* was properly payable; or they thought, as the truth is, that the penal rent was abandoned in consideration of the improvement of the river, and the expense in effecting it; in fact, the work could not have been done without the acquiescence, at least, of the owners of Ratheldron, for otherwise the Plaintiff would have been a trespasser; and that he had such acquiescence is clearly proved by the fact of the Defendant himself having permitted him to cut a drain through Ratheldron for the purposes of the work. In *Roy v. The Duke of Beaufort*(a), the Plaintiff's son having been found poaching on the Duke's land, the Plaintiff gave a bond in 100*l.*, conditioned that his son should not poach or fish there again; the son, some years after, in company with two of

(a) 2 Atk. 190.

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the Duke's servants, caught two flounders, and two years after that the bond was put in suit, and judgment recovered for 100*l.* penalty, and 40*l.* damages; a bill was filed to be relieved from the penalty and damages, and for a perpetual injunction. Lord *Hardwicke* said, "the third is the most material consideration, and that is the ill use which has been made of this bond; it is a very material circumstance that the Plaintiff's son had a license, or, at least, encouragement, to fish, by being in company with two of the Duke's servants, one of whom was brother-in-law to *Marks*, the gamekeeper. It frequently happens there may be a just cause of action, yet the real motives may be very unjust, which a Court of Equity will always take into their consideration."

The evidence in the cause shews, that not only was the Defendant aware of the works in which the Plaintiff was engaged, but that he acquiesced in, and actually encouraged, their erection. This encouragement is sufficient to entitle him now to the interposition of the Court in restraining the Defendant from asserting his legal right. Such an equity is well established, and has been recognized in *Jackson v. Cator*(a), *Dann v. Spurrier*(b), and a very recent case before Lord *Cottenham*, *Williams v. The Earl of Jersey*(c). On this ground, therefore, the present bill must be sustained. In *Macher v. The Foundling Hospital*(d), the lease contained a covenant against carrying on certain trades, under penalty of forfeiture; the tenant served notice on some only of the governors, who were five hundred in number, of an intention to alter the pre-

(a) 5 Ves. 688.

(c) Craig &amp; P. 91.

(b) 7 Ves. 231.

(d) 1 Ves. &amp; B. 189.

mises, and establish one of those trades; an ejectment was thereupon brought, and a bill for an injunction was subsequently filed: Lord *Eldon* said, "the real question is, whether from the circumstance of notice to some of the members, the Corporation can be considered as bound, having stood by, permitting the expenditure." This case shews that, in Lord *Eldon's* opinion, if a tenant, about to expend money on premises contrary to a covenant, give notice of his intention to the landlord, and he stand by without objection, he cannot afterwards take advantage of the breach of covenant. In *Hume v. Kent(a)*, *Hume* held under *Kent* thirteen feet six inches of one lot of ground, and also a larger lot; the lease contained a covenant that if houses of a certain description were not built within a given time the rent should be 80*l.* a-year, instead of 34*l.* 4*s.* 6*d.* The houses were not built, and *Kent* brought an ejectment for non-payment of the penal rent, had judgment, and executed his *habere* in 1803: but he allowed *Hume* to continue in possession, who, supposing the thirteen feet six inches to be part of another lot, for which he had compromised, expended 5000*l.* in building on both. *Kent* afterwards, in 1810, brought an ejectment on the title; a bill was then brought by *Hume* for a perpetual injunction. Lord *Manners*, in giving judgment, said, "this is a penalty, or it is a compensation in damages, and not rent." The cases of *Peachy v. The Duke of Somerset(b)*, *Richardson v. Evans(c)*, *Liggins v. Inge(d)*, are all to the same effect.

As to the conversations between the witnesses, *Young* and *Samuel Gerrard*, they were casual and in jest; had

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(a) 1 Ball & B. 554.

(c) 3 Madd. 218.

(b) 1 Strange, 447.

(d) 5 Moore & P. 712.



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*Young* thought them otherwise, he would have communicated in proper form with the Plaintiff himself or his solicitor, or called the attention of the Master to the subject; a course, it appears from the evidence, he always adopted, when he considered the business required serious consideration.

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*Judgment.* THE LORD CHANCELLOR :—

This case has been very well argued by the Plaintiff's counsel, but his bill cannot be sustained. The first question raised related to the construction of the covenant in the lease, and I am clearly of opinion, that the case is not one of a penalty, but of a double rent. All the authorities upon this subject have been so recently under my consideration<sup>(a)</sup>, that I do not feel it necessary to examine them again. There is nothing in the peculiar nature of this covenant to induce me to think that a penalty was meant; it is true that it speaks of "penalty," but this, though perhaps a circumstance entitled to some weight, is certainly not conclusive. Now a double rent is provided expressly, and is to be recovered by distress; for as the law gave a power of distress for the single rent, so this covenant provided that the double rent should be recovered by distress. This power of distress implies the relation of landlord and tenant, and therefore rent was meant in the strict sense of the term: in the event mentioned in this covenant the single was to be turned into a double rent. If the party thought that this was the case of a penalty, why did he not try the question at law? It is altogether a mistake to suppose that there is one rule at law,

(a) *French v. Macale*, ante, vol. ii. p. 269.

and another in equity. I am bound to give this lease the same construction which it would receive in a Court of Law. If the party thought this a penalty he should not have discontinued his action at law, and come into this Court for a peculiar construction of this covenant. In my opinion, this covenant merely amounted to the reservation of a double rent in a certain event, and, consequently, on the first ground at least, this bill cannot be sustained.

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As to the question whether the Defendant had knowledge of the fact of the going on of the works, and as to the consequence of such knowledge, one would have almost supposed that Mr. *Young*, and not Mr. *O'Reilly*, was the Defendant, and that relief was sought against the former. It is certainly true that you may prove that a solicitor has had notice in the same transaction, or so recently that it is impossible to suppose he could have forgotten it, and then hold that the party himself had notice in effect(a). This is a rational rule; "for otherwise," as Lord *Hardwicke* once observed(b), "a man, who had a mind to buy another's estate, might shut his own eyes and employ another to treat for him." The rule or principle is, in itself, a sound one, but it must not be carried too far.

It appears that Mr. *Young*, who was the receiver in the cause of *Blount v. Cusack*, had his attention drawn to the damage, which was alleged to have taken place before the award was made, just as *White's* attention had been drawn to the like damage as to his lands. *White* had commenced an action at law, and *Young* came before the Court and asked for a reference to ascertain the damage,

(a) See *Fuller v. Benett*, 2 Hare, 394. (b) *Attorney-General v. Gower*, 2 Eq. Ca. Abr. 685.

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and also for an inquiry as to the breach of covenant; but the Master of the Rolls very properly refused the application, observing, that as the action at law between *White* and *Gerrard* was going on, there would be no use in the reference. So far it was plain enough; but *White*, when about to try the action, seems to have become apprehensive as to the result. He entered into a compromise, and accordingly a reference was made to the arbitration of three engineers, gentlemen of respectability and skill, and with their award there is no fault to be found. They directed a stone weir to be built across the whole river; this would have obviated the difficulty before them, but it so happened that there was a particular covenant in the lease, prohibiting the very act which the engineers had directed to be done, and, of course, they could not absolve the Plaintiff from his covenant: they knew nothing about this covenant, but he was well aware of its existence. Notice of this award was served on the parties in the action, but was not served on *Young*, although it should have been, for he was receiver in the cause, and had made the motion in 1837. This notice, which was addressed to each party, says—"I send you the award, that I may have your consent," &c. Now, if he thought it was necessary to have this consent, why did he not wait for it? He should have informed this Court of the state of circumstances, and asked it to give efficacy to the act of the arbitrators. On such an application the Court would have directed a reference to the Master, for the purpose of ascertaining whether it was for the advantage of the parties that such consent should be given: and on the Master's report that it was right, the application would have been acceded to. He would, therefore, have obtained that consent if he was

entitled to it; but he seems to have been anxious to avoid asking for the consent, because he saw that course would lead to an investigation, which he thought might be unfavourable to him. Now I am asked to bind not only the seller but the purchaser: but if ever there was a case, in which a party was bound to come into Court and ask for its consent to a proceeding, this is that case. The purchaser had a right to come in and buy, and to take advantage of the covenant; but the imposition of the double rent was to prevent the doing of the act; the object was to sell with the benefit of the covenant, but the purchaser could not have the benefit both of the double rent, and of the covenant not to do the act.

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But what was the conduct of the Defendant? He became the purchaser in 1838; subsequently he did not like the title, and tried to get rid of his bargain, but he failed in his attempt, and in 1839 was fixed with the title. However, before the sale was confirmed, as is very usual, he went down, with his family, into the country to look at his purchase. He then saw the works going on, but he did not attempt to interfere, and this, it is said, amounts to acquiescence binding on him. But he had not completed his purchase at the time, and if he had presumed to interfere to stop the works, they would have laughed at him; and besides this want of right on the part of the purchaser, the lessee was entitled to do the act upon condition of paying the double rent: and this is just what would have been said, if he had interfered.

It must not be understood that this Court will, on light grounds, act against the legal rights of parties in cases like the present. There must be fraud, or such acquies-

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cence, as in the view of this Court would make it a fraud afterwards to insist upon the legal right. The case of *Macher v. The Foundling Hospital*(a) was a very hard case, and it was strenuously argued at the bar; yet Lord Eldon denied the relief generally. This shews that it requires a very strong case to induce this Court to deprive a man of his right at law to prevent a particular act from being done, or his right to receive damages, if it be done. No act has been shewn in this case amounting to such acquiescence; on the second ground therefore the bill cannot be sustained.

*Jan. 31.*

On the following day the Lord Chancellor again mentioned the case, and said, he considered that there was not any remedy for the difficulty under which the Plaintiff laboured; and that even if he could have looked upon the reservation as a penalty, he could not give any relief except upon the condition of the abatement of the nuisance.

An offer having been made on the part of the Defendant in conformity with the relief sought in the third alternative of the prayer of the bill, and the Plaintiff having agreed thereto, the decree was eventually drawn up as follows:—

*Decree.*

By consent of both parties, declare the Plaintiff liable to pay to the Defendant double rent for the lands and premises in the pleadings mentioned, from the 1st of November, 1839: let the Plaintiff be at liberty to remove the weir on or before the 1st of November next; and in case he shall remove it then, let the double rent cease from the day of such removal. Let the Plaintiff pay to

(a) 1 Ves. &amp; B. 189.

the Defendant all his costs of this suit; and upon payment of the double rent up to the 1st of November next, and the Defendant's costs, then let the recognizance entered into by the Plaintiff be discharged: with liberty to either party to apply to the Court on the first day of next Michaelmas Term, if there shall be occasion.

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*Reg. Lib. 87, fol. 169, 1843.*

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THE bill in this cause was filed to obtain the opinion of the Court upon the construction of a settlement of the 3rd of July, 1801.

Feb. 2.

By a settlement of the 3rd of July, 1801, certain freehold lands were settled by T. G. on his eldest son, J. G., and his issue, in strict settlement; with an ultimate remainder to H. G. (the second son of the settlor), in fee. By the same settlement certain other lands, which were partly freehold and partly chattel, were settled on T. G. for life; "and from and after the decease of the said T. G. to the several uses, intents, and purposes as are hereinbefore

By that deed, which was made between *Thomas Garde* and *John Garde*, his eldest son, of the first part, *Christopher Frederick Musgrave* and *Anne* his daughter, then wife of the said *John Garde*, of the second part, and *Sir Richard Musgrave* and *Henry Prendergast Garde*, youngest son of the said *Thomas Garde*, of the third part: after reciting that a marriage had been recently solemnized between the said *John Garde* and the said *Anne Musgrave*, and that previous thereto it had been agreed upon by and between the said *Thomas Garde* and the said *Christopher F. Musgrave*, that in consideration of the marriage, and of the portion of 2000*l.*, to which the said *Anne* was entitled, being paid over to the said *John Garde*, the said *Thomas Garde* would con-

expressed and declared," respecting the first set of lands, and subject to which those lands were, in the previous part, limited to the issue of J. G., "to and for the use and benefit of the said H. G., subject to the provisions heretofore made for the issue of the said marriage:"—*Held*, that the second class of lands were settled to the same uses as were declared respecting the first, and that H. G. took an estate in both lands in fee.

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vey his estate and interest in the premises therein mentioned for the uses therein declared, it was witnessed, that the said *Thomas Garde*, in pursuance of the said agreement and for the considerations therein mentioned, did release the lands of Kilrush and Kippane, of which he was then seised in fee, and the lands of Ballynacurra, which he held under a lease of lives, with covenant for perpetual renewal thereof, situate in the county of Cork, unto the said *Sir Richard Musgrave* and *Henry P. Garde*, upon trust, to permit and suffer the said *John Garde*, and his assigns, for and during his natural life, to receive and take the rents, issues, and profits thereof; with remainder, subject to an annuity or jointure for the said *Anne*, in case she should survive the said *John Garde*, and to a sum of 3000*l.* as portions for the younger children of the marriage, to the use of the first or any other son of the said *John Garde* on the body of the said *Anne* his wife lawfully to be begotten, in fee, on his or their attaining the age of twenty-one years, or marrying with the consent of the said trustees: with remainder, in case there should not be any son of the said *John Garde*, by his then wife, or by any after-taken wife, who should attain the age of twenty-one years or marry, to such uses as the said *Thomas Garde* should by any deed, or by his last will and testament, direct and appoint; and in default of appointment, to the said *Henry Prendergast Garde* in fee.

And by the said deed, after further reciting, that the said *Thomas Garde* was also seised in fee of an undivided third of the lands of Carduggan and Ballymacsliny, situate in the county of Cork; and was also seised and entitled to an undivided third of the lands of Railstown, Rathbrit, and Kilbra, situate in the county of Tipperary, by virtue of

part of a lease of lives renewable for ever, and in part of a lease for a long term of years, it was witnessed, that in pursuance of the said agreement, and for the considerations therein, the said *Thomas Garde* granted, released, and confirmed unto the said Sir *Richard Musgrave* and *Henry Prendergast Garde*, and their heirs, the said lands of Carduggan and Ballymacsliny, and also the lands of Railstown, Rathbrit, and Kilbra, in trust for the said *Thomas Garde*, for his life, with remainder to trustees to preserve; and from and after the decease of the said *Thomas Garde*, "to the several uses, intents, and purposes as are hereinbefore expressed and declared concerning the said lands of Kilrush, Kippane, and Ballynacurra, and subject to the jointure hereinbefore provided for the said *Anne Garde*, or for any after-taken wife of the said *John Garde*, as hereinbefore expressed, and to such provision as is hereinbefore provided for the younger children of the said marriage, and to the several estates therein limited, to the several and successive sons of the said *John Garde*, to be begotten on the body of any after-taken wife, and subject thereto, on the contingencies aforesaid, for such use and uses as the said *Thomas Garde* shall by any deed to be by him executed in the presence of two subscribing witnesses, or by his last will and testament, limit and appoint the same for; and in case the said *Thomas Garde* shall not by deed or will limit or appoint the same, then in trust and confidence, to apply and dispose of such rest, residue, and remainder of such rents, issues, and profits, to and for the use and benefit of the said *Henry Prendergast Garde*, subject to the provisions hereinbefore made for the issue of said marriage."

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The deed then concluded with a covenant for further



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assurance on the part of *Thomas Garde* and *John Garde*, whereby they “ jointly and severally covenanted with the said Sir *Richard Musgrave* and *Henry Prendergast Garde*, that they and each of them, &c., would, from time to time, and at all times, &c., do, levy, and execute all and every such further and all other reasonable acts and assurances whatsoever in the law, for the better and more perfect assuring, settling, and conveying, of all and singular the hereinbefore mentioned lands and premises to the uses, intents, and purposes hereinbefore mentioned, limited, and expressed, for and concerning the same, as shall be, &c.”

*Thomas Garde*, the father, died in the year 1806, leaving his two sons, *John Garde* and *Henry Prendergast Garde*, him surviving ; and having by his will bequeathed some legacies, and also devised and bequeathed all the rest, residue, and remainder of his fortune, both real and personal, to his two sons, share and share alike.

*John Garde* died in the year 1832, leaving his widow *Anne*, and *Henry Prendergast Garde* his brother, him surviving ; there never had been any issue of the marriage. Previous, however, to the death of *John* he made his will, and thereby devised all his real and personal estates to his nephew *Thomas Garde*, the eldest son of *Henry Prendergast Garde*, and the principal Defendant in the cause.

On the death of *John Garde*, *Henry Prendergast Garde* entered into possession of the lands and premises, which formed the subject of the settlement of the 3rd July, 1801 ; and subsequently departed this life on the 27th of July, 1841 : and by his will, after charging his real and per-

sonal property with a sum of 11,000*l.* for his children, he devised all his real estates and freeholds to be equally divided between his three sons, *Thomas Garde*, *Edward Garde*, and *Henry P. Garde*.

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v.  
GARDE.  
Statement.

The bill was filed by *Edward Garde* and *Henry P. Garde* against *Thomas Garde*, praying that the Plaintiffs and Defendant, *Thomas*, might be declared entitled as tenants in common to the entire of the lands and premises included in the settlement of the 3rd of July, 1801.

There were several questions raised upon the pleadings, but the only point, which was discussed at the hearing, was what estate *Henry Prendergast Garde* took in the lands of Carduggan, Ballymacsliny, and the lands in the county of Tipperary, and which were the second set of lands comprised in the settlement of 1801; the Defendant, *Thomas Garde*, insisting, that under the limitations of that settlement, his father, *Henry Prendergast Garde*, took but a life estate in those lands; that they descended to his uncle, *John Garde*, as heir at law of *Thomas*, the original settlor, and, under the will of *John*, were now vested in him.

The Plaintiffs, on the other hand, insisted, that upon the true construction of the settlement, *Henry Prendergast Garde* took an estate in fee in those lands, and that they consequently passed under his will to the Plaintiffs and the Defendant, *Henry P. Garde*, as tenants in common in fee.

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Mr. Serjeant *Warren* and Mr. *Brooke*, for the Plaintiffs.

The *Attorney-General*, Mr. Serjeant *Keatinge*, and Mr. *Moore*, for the Defendant.

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THE LORD CHANCELLOR:—

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Judgment.

The question is, what estate in the second class of lands passed to *Henry P. Garde* under the limitations of the settlement of 1801. By that deed, the lands of Carduggan, and certain other denominations (some of which were chattel), were conveyed to trustees and their heirs, in trust for *Thomas Garde* for life, remainder to trustees to preserve; “and from and after the decease of the said *Thomas Garde*, to the several uses, intents, and purposes as are hereinbefore expressed and declared respecting the said lands of Kilrush, Kippane, and Ballinacurra,” the first set of lands. If the deed had stopped there, there would have been no question; all the uses, to which the first lands were limited, would have applied: and as by those limitations the lands were settled upon *Henry P. Garde* in fee, in clear, unambiguous terms, there would be no difficulty. But the words run on thus: “and subject to the jointure hereinbefore provided for the said *Anne Garde*, or for any after-taken wife of the said *John Garde*, as hereinbefore expressed, and to such provision as is hereinbefore provided for the younger children of the said marriage, and to the several estates therein limited to the several and successive sons of the said *John Garde*, to be begotten on the body of any after-taken wife; and subject thereto, on the contingencies aforesaid, for such use and uses as the said *Thomas Garde* shall by any deed to be by him executed in the presence of two subscribing witnesses, or by his last will and testament, limit and appoint the same for; and in case the said *Thomas Garde* shall not by any deed or will limit or appoint the same, then in trust and confidence, to apply and dispose of such rest, residue, and remainder of such rents, issues, and profits to and for the use and benefit of the said *Henry Prendergast Garde*, subject to

the provisions hereinbefore made for the issue of the said marriage." I am of opinion, that all the words subsequent to the words "to the several uses, &c.," are a mere inaccurate, informal reference to the former limitations; a short recapitulation of the uses, to which the first estate was settled, and not an attempt to repress or limit them. The whole chattel interest clearly passed; and this is a circumstance of some weight. The covenant for further assurance seems to shew, that the whole interest was considered to have passed; and the intention is perfectly obvious, to carry the second class of estates to the same uses as the first. I shall, therefore, construe the deed thus: that these latter words were a mere repetition; that the second estate was really settled to the same uses as were declared respecting the first; and that *Henry P. Garde* took an estate in both lands in fee. I think I am at liberty, in favour of the clear intention, to adopt this construction, which removes all ambiguity, and obviates every difficulty.

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Judgment.

Declare the limitations, created by the deed bearing date the 3rd of July, 1801, in the pleadings mentioned, valid, and such as should be carried into effect; and accordingly declare the Plaintiffs, *Edward Garde* and *Henry Prendergast Garde*, and the Defendant, *Thomas Garde*, each entitled to one-third of the lands thereby limited, being the lands of Kilrush, Kippane, Ballynacurra, Carduggan, and Ballymacsliny, situate in the county of Cork; and the lands of Railstown, situate in the county of Tipperary: and let the said parties, Plaintiffs and Defendants, be paid their cost in this cause, when taxed and ascertained, out of the funds, being the residue of the personal estate of the said testator, *Henry Prendergast Garde*.

Decree.

*Reg. Lib.* 87, fol. 172, 1843.

1843.

*In Re DOOLAN, a Lunatic.*

Jan. 11. Feb. 6.

In this case an application was made, on the part of persons representing the tenant, for a reference to the Master, to inquire and report as to the liability of a lunatic to renew the lease, under which the premises were held. The application was granted; and the right of the parties seeking the renewal was established:—*Held*, nevertheless, that the costs of the petition, and all the proceedings thereunder, should be borne by the applicants.

The proper course for a party to adopt in such a case is, to apply, in the first instance, to the committee of the estate, before he himself brings forward any application to the Court.

BY indenture of lease bearing date the 28th of October, 1782, *John Simpson* demised unto *Thomas Palmer* certain premises situate in the King's County, for the lives of *Thomas Doolan*, *Wm. Doolan*, and *John Doolan*, at the yearly rent of 42*l.*; and in said lease was contained a covenant for the perpetual renewal thereof upon payment of a nominal renewal fine.

The premises in question were held by *Simpson*, under a lease from the Corporation of Trinity College; and *Simpson's* estate having become vested in the lunatic, *Thomas John Doolan*, and the interest of *Palmer*, the sublessee, having passed by assignment to *Thomas Doolan*, the said lease of the 28th of October, 1782, was renewed by indenture of the 26th of January, 1831, in pursuance of an order of the 29th of November, 1830, made in the matter of the lunacy.

The interest of the lessee, *Thomas Doolan*, was directed to be sold by a decree pronounced in the cause of *Sheppard v. Doolan*, in the month of June, 1841; but two of the lives in the said renewal having dropped, it became necessary to obtain a further renewal, in order to make out a satisfactory title to a purchaser. Accordingly, by an order of the 9th of November, 1841, the receiver in the said cause was directed to be at liberty to proceed to obtain a further renewal of the said original lease.

A petition was thereupon presented by the receiver in the lunacy matter, praying that it might be referred to

the Master in the matter to inquire and report whether the original lease contained a covenant binding upon the lunatic to grant a further renewal of said lease; and, if so, whether any and what sum was due and payable for rent reserved under same.

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—  
*In re*  
DOOLAN.  
—  
*Statement.*

On the 13th of June, 1842, this petition came on to be heard, when the Court was pleased to make an order that it should be referred to the Master to inquire and report whether the original lease contained any and what covenant for renewal: and if there should be any such covenant, then that the said Master should report whether the said lunatic was bound to renew, and, if so, whether any and what sums were due and payable for rent or renewal fines: and further directions were reserved until the return of the Master's report, and the committee were ordered to attend before the Master under this order.

The Master, by his report bearing date the 23rd of November, 1842, reported that the lunatic was bound to renew said original lease; and that there was due and payable to the said lunatic, or the committee of his estate, the sum of 38*l.* 15*s.* 4½*d.*, being for one year's rent, reserved by the said original indenture of lease up to and for the 1st of May, 1842.

A petition was thereupon presented by *Wm. Sheppard*, the receiver in the said cause, praying that this report might be confirmed, and that on payment of the sum of 38*l.* 15*s.* 4½*d.* to the receiver in the matter, *Wm. Henn*, Esq., the committee of the estate of the lunatic should execute a further renewal of the said lease of the 21st of October, 1782, for the lives of the persons in the said

1843. *petition named: and that the said receiver, Wm. Shep-*  
*In re pard, should be paid out of the funds to the credit of the*  
*DOOLAN. lunatic the costs of the original petition of the 3rd of June,*  
*Statement. 1842, and the costs of the proceedings thereunder, save*  
*the costs of preparing such further renewal as aforesaid,*  
*and the counterpart thereof.*

*Argument.* The *Attorney-General* and Mr. *J. Wall* now moved the prayer of the petition. The only question was, by whom the costs were to be borne. The costs of the renewal and the counterpart must, of course, fall upon the tenant; but the expenses of the reference, and the proceedings thereunder, which have, in point of fact, been altogether occasioned by the lunacy, ought to come out of the lunatic's estate. *Ex parte Prickett(a)*, and *ex parte Richards(b)* were cited.

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*Feb. 6.* THE LORD CHANCELLOR:—  
*Judgment.*

In this case a petition had been presented, praying that it might be referred to the Master to ascertain whether a lunatic was bound to execute a renewal of a lease of certain lands, and asking for the costs of the petition and reference out of the lunatic's estate. The Master has reported, that the lunatic was bound to renew; and on the motion to confirm this report, the right of the petitioner to the costs sought for by the petition was pressed, and cases were cited to support the application. I must, however, decline to give these costs.

When a party, desirous to establish an adverse claim of this sort against a lunatic, comes here himself, he

(a) 3 Swanst. 130.

(b) 1 Jac. & W. 264.

must not expect to get costs. The proper course for him to adopt is to apply, in the first instance, to the committee of the estate: the committee informs the Court of the fact, and the Court then judges whether or not the lunatic is bound to do the act required. In this way no adverse costs are incurred, and every thing necessary is done on the lunatic's part. If in any case the committee should refuse or neglect to inform the Court, when applied to, the other party might then, perhaps, be justified in presenting a petition on his own part, and the Court would know how to deal with the costs in such a case. I wish it to be understood, that in future, in cases of this sort, I shall expect the committee to come forward, and ask for the reference to ascertain what is binding upon the estate. Here one of the Masters of the Court is committee of the estate of the lunatic. This practice ought to be altered(a). It is not my intention, in future, to allow the Masters to be committees of the estates of lunatics, or guardians of the fortunes of minors.

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Judgment.

In this case let the report of the Master be confirmed: the petitioner must pay the costs of the reference and the subsequent proceedings, and the tenant the costs of the deed of renewal.

“ It is ordered by his Lordship that the said report do stand confirmed: and accordingly it is further ordered that, upon payment of the sum of 38*l.* 15*s.* 4½*d.* by the said *Thomas Doolan* to the receiver in this matter, and of

Order.

(a) See on this point the case *ford* in *Ex parte The Earl of Lanes-*  
*of Ex parte Fletcher*, 6 Ves. 427; *borough*, Lloyd & G., temp. Plun-  
and the observations of Lord *Gif-* ket, 503, 504.



1843.

*In re*  
DOOLAN.  
*Order.*

all subsequent rent (if any due), *Alfred Goodlatt Richardson*, the receiver, in whom the legal estate is vested, do execute in the name of the said lunatic such renewal of the lease, bearing date the 28th of October, 1782, in the said report mentioned, to the said *Thomas Doolan*, as the Master shall approve: and it is further ordered, that the petitioner, *William Sheppard*, do pay the costs of the former petition and of the order thereon, and reference and report thereunder, and of this application: and it is further ordered, that the said *Thomas Doolan* do pay the costs of the deed of renewal."

## SIMPSON v. O'SULLIVAN.

Feb. 6, 7.

By indenture of settlement of the year 1808, and made on the marriage of *A.*, certain premises, which were chattel,

BY indenture of settlement bearing date the 25th of January, 1808, and made between *James O'Sullivan* of the first part; his second son, *James O'Sullivan*, the younger, of the second part; *John Keane* and *William Ferguson* of the second part; *A.* having become indebted to *Q. H.* in the sum of 1500*l.*, assigned his life estate to the said *Q. H.*, by way of mortgage; and for the purpose of more effectually securing the payment of said sum of 1500*l.*, he, by virtue of the power in the said settlement, granted and appointed, by way of mortgage, the said sum of 1000*l.* In 1817, *A.* became bankrupt, and under an order made in the matter of the bankruptcy, all the estate and interest of the assignee, and also of *Q. H.*, were purchased by the Plaintiff, and assigned by deed of the 1st of October, 1818. *A.* subsequently died: on a bill filed by the Plaintiff to have the benefit of his purchase, it was held, on appeal to the House of Lords, that by virtue of the assignment, the Plaintiff became entitled to this sum of 1000*l.*, in addition to the life estate of the bankrupt. The cause now coming on upon the report of the Master, ascertaining the amount due to the Plaintiff for principal and interest:—*Held*, that the settlement of 1808, under which the right to charge the sum of 1000*l.* arose, authorized the creation of that charge with interest.

The rate of interest was declared to be 5 per cent., according to the rule of the Court, there being no contract between the parties as to the rate of interest.

the third part ; and *Honora O'Sullivan*, then *Honora Keane*, of the fourth part, being the settlement executed in contemplation of the marriage of the said *James O'Sullivan*, the younger, with the said *Honora Keane* ; after reciting, that *James O'Sullivan*, the elder, was possessed of certain premises, called the Island, or Bog of Monamucky, for the term of 999 years, under and by virtue of a certain indenture of lease of the 29th of April, 1795 ; and that he had built several houses on a part thereof ; and that he had lately, by indenture of lease of the 10th of May, 1805, demised a certain portion thereof unto *Jonathan Smyth* and *Joshua Smyth*, for the term of 889 years, reserving thereout a yearly profit of 317*l.* 8*s.* : the said *James O'Sullivan*, the elder, in consideration of the said intended marriage, duly conveyed unto the said *John Keane* and *William Ferguson*, their executors, administrators, and assigns, all that, the portion of said premises so lately demised to the said *Jonathan* and *Joshua Smyth*, and also one of the houses lately built by the said *James O'Sullivan*, the elder, situated in Clare-street, being the house next to Mrs. *Gavin's*, and lately occupied by Mr. *Dwyer*, to hold the same to the use of the said *James O'Sullivan*, the younger, during his natural life ; and from and after his decease, upon trust, to pay the sum of 100*l.*, sterling, yearly, to the use of the said *Honora*, his intended wife, and her assigns, for and during her natural life, as and for her jointure ; and subject thereto to the use of the heirs male of the body of the said *Honora*, by the said *James O'Sullivan*, her intended husband ; and for want of issue lawfully to be begotten between them, to the use of the said *James O'Sullivan*, the younger, his heirs and assigns, for ever ; and the said deed contained the following covenant : “ and it is covenanted, granted, concluded, and

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agreed upon, by and between the said parties to these presents, that the said *James*, the second son, shall be at liberty to raise, by deed, mortgage, or by any other writing, a sum of 1000*l.*, to be applied to any purposes the said *James*, the second son, pleases, in case the said marriage shall take effect; but the said sum of 1000*l.* is not to be raised by way of the sale of said lands, tenements, and hereditaments aforesaid."

By indenture of mortgage of the 24th of January, 1811, and made between the said *James O'Sullivan*, the younger, of the one part, and *Quintin Hamilton* of the other part, after reciting the said indenture of the 25th of January, 1808, and that the said *James O'Sullivan*, the younger, stood indebted to the said *Quintin Hamilton*, in the sum of 1500*l.*; and that in order to secure and pay the said principal sum of 1500*l.*, and the interest then due, and all interest, costs, charges, and expenses thereafter to grow due, the said *James O'Sullivan*, the younger, had agreed to assign to the said *Quintin Hamilton*, the premises formerly demised to the said *Jonathan* and *Joshua Smyth*, and the said house in Clare-street, and all his estate, term, and interest therein, by virtue of his marriage settlement or otherwise; and to assign and appoint to the said *Quintin Hamilton*, as a further and collateral security, the said sum of 1000*l.*, which he had power to raise by virtue of the said settlement, to be applied in part payment of the said sum of 1500*l.*, and the interest, costs, charges, and expenses as aforesaid: it was witnessed, that in pursuance of the said agreement, and for the purpose of carrying the same into effect, the said *James O'Sullivan*, the younger, granted and assigned unto the said *Quintin Hamilton*, his executors, administrators, and assigns, all the aforesaid

premises, therein mentioned to have been demised to the said *Jonathan* and *Joshua Smyth*, and also the said house in Clare-street, and all the estate of him the said *James O'Sullivan*, the younger, therein either at law or in equity, subject, however, to the proviso or condition of redemption in the said deed particularly mentioned.

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And it was by the said deed further witnessed, that in order the further, and better to secure and satisfy the payment of the said sum of 1500*l.*, and the interest thereof, and all such costs, charges, and expenses as aforesaid, he the said *James O'Sullivan*, the younger, by virtue of the power and authority by the said settlement in him vested, for himself, his heirs, executors, and administrators, did grant, assign, charge, and appoint, by way of mortgage or otherwise, pursuant to the said settlement of the 25th of January, 1808, the said sum of 1000*l.* to the said *Quintin Hamilton*, his executors, administrators, and assigns, with such power and authority to him and them to raise and levy the same as were given and granted to the said *James O'Sullivan*, the younger, by the said settlement, or in any other manner whatsoever; and when so raised and levied to apply the same and every part thereof, in and towards satisfaction and discharge of the said sum of 1500*l.*, and such interest thereof, costs, charges, and expenses, as aforesaid, as should, at the time of such raising and levying thereof, be due and owing; then followed a proviso, that when the said sum of 1500*l.*, and such the interest thereof, costs, charges, and expenses as aforesaid, should by, from, or out of the receipt and perception of the rents, issues, and profits of the premises thereby assigned, or by, from, and out of the receipt of the said sum of 1000*l.* thereby granted, charged, and appointed to be paid as aforesaid,

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or otherwise, should be fully satisfied and discharged, that then the said deed of mortgage should cease and determine, and be absolutely null and void to all intents and purposes.

On the 1st of February, 1817, a commission of bankrupt issued against the said *James O'Sullivan*, the younger, and *Henry O'Sullivan* was appointed thereunder the sole assignee of the estate and effects of the bankrupt.

By an order of the Lord Chancellor, bearing date the 29th of November, 1817, made upon the petition of the said *Quintin Hamilton*, preferred in the matter of the bankruptcy, it was, amongst other things, ordered, that the Commissioners in the said matter should take an account of what sum was due to the said *Quintin Hamilton* on foot of the said mortgage, for principal, interest, and costs, and that the said mortgaged premises should be forthwith sold before the said Commissioners, and that all proper parties should join in executing the conveyance thereof to the purchaser, and that the Petitioner should be paid out of the produce of such sale in the first instance, such sum or sums of money as should appear to be due to him, together with the costs of that application, and all future costs touching the same.

In obedience to this order the Commissioners took the account, and found that there was due to the said *Quintin Hamilton*, on foot of the said mortgage, for principal and interest, a sum of 796*l.* 16*s.* 8*d.*, sterling, up to the 31st of December, 1816. On the 27th of April, 1818, the mortgaged premises were sold to *Robert Simpson*, the Plaintiff in this cause, for the sum of 850*l.*; and accord-

ingly, by indenture of assignment of the 7th of October, 1818, and made between the said *Henry O'Sullivan* of the first part, the said *Quintin Hamilton* of the second part, and the said Plaintiff of the third part; it was witnessed that the said *Henry O'Sullivan* and *Quintin Hamilton*, according to their respective rights and interest, granted and assigned unto the said *Robert Simpson*, his executors, administrators, and assigns, all the estate and interest which at any time heretofore were of him the said *James O'Sullivan*, the bankrupt, under and by virtue of the therein recited settlement of the 25th of January, 1808, and which at any time became vested in them, the said *Henry O'Sullivan* and *Quintin Hamilton*, as aforesaid, of and in all that, &c.; all which said premises were situated in Clare-street, in the City of Limerick; and also all right to the benefit of charge and appointment, and interest in and to the said sum of 1000*l.*, by the said settlement limited and given to the said *James O'Sullivan*, the bankrupt, freed and absolutely, and for ever, discharged, of and from all right and equity of redemption in respect thereof.

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*James O'Sullivan*, the younger, departed this life in the month of August, 1836, leaving *James O'Sullivan*, the Defendant in this cause, his eldest son and heir *quasi* in tail of the premises comprised in the settlement of the 25th of January, 1808.

The estate and interest, which was conveyed to the Plaintiff by the deed of assignment of the 7th of October, 1818, being merely equitable, the legal estate therein remaining in the trustees of the marriage settlement, shortly after the decease of *James O'Sullivan*, the younger, an ejectment was brought in the names of the Defendant,

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*James O'Sullivan, and John Keane*, the surviving trustee of the settlement of January, 1808, whereupon the Plaintiff filed the present bill, in which, after setting forth all the matters aforesaid, he stated, that upon the execution of the deed of assignment of October, 1818, he had entered into possession of the premises thereby assigned, and had ever since continued in such possession, dealing with the same as his own absolute property, and as freed and discharged of and from the proviso of redemption contained in the said deed of mortgage of the 24th of January, 1811, and had from time to time laid out and expended large sums of money in keeping the houses, which were upon the premises, in tenantable order and repair.

The bill charged that the proviso of redemption in the deed of mortgage, and all equity arising thereunder, had been barred and foreclosed by the proceedings in the matter of the bankruptcy; that all right and equity of redemption, if any, became vested in the assignee of the bankrupt, and was by him legally assigned to the Plaintiff by the deed of October, 1818; and that the Plaintiff was entitled to have any estate which might be outstanding in *John Keane*, as such surviving trustee of the said marriage settlement, conveyed to him; or, at any rate, that he was entitled to the sum of 1000*l.*, with interest at six per cent., since the time of the death of the bankrupt.

The bill prayed, that it might be declared that the said deed of mortgage was a good and valid execution, by way of mortgage, of the power given by the said marriage settlement to charge the several premises comprised therein, and that such mortgage had been duly foreclosed as against the said bankrupt and his assignees; and that the several

Defendants might be in like manner foreclosed of all equity of redemption in the premises; and that the said *John Keane*, as such surviving trustee as aforesaid, might convey to the Plaintiff the legal estate in the said premises; or, in case the Court should not deem the Plaintiff entitled to the relief so prayed, then that the Plaintiff might be deemed entitled to the charge of 1000*l.*, as assignee of the said *Quintin Hamilton*, with interest at six per cent. per annum, since the time of the death of the said *James O'Sullivan*, the younger; and that the Plaintiff might be declared entitled to be reimbursed any sum expended by him in the valuable improvement of the said premises, with legal interest thereon; and that for that purpose all necessary accounts might be taken; and for a sale for the payment of the sum, which should be so found due to the Plaintiff; and for an injunction to restrain the Defendants, *James O'Sullivan* and *John Keane*, from proceeding further in the ejectment, and from all other proceedings at law or otherwise.

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The Defendant, *James O'Sullivan*, by his answer, submitted that the deed of the 24th of January, 1811, was but a mortgage of the life estate of the said bankrupt, accompanied by an assignment of the sum of 1000*l.*, which he had power, under the settlement of 1811, to charge upon the said premises; and that, according to the true intent and meaning of the settlement, the said sum was to be raised out of the rents and profits of the said premises, and not otherwise; that the order in bankruptcy had been fraudulently obtained, and by a suppression of the fact, that the said *James O'Sullivan* was only tenant for life; and that the said *Quintin Hamilton* was only entitled to have the said sum of 1000*l.* raised by and out of the rents



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and profits, or by a sale of the life estate. The Defendant, by his answer, admitted that the sale to the Plaintiff in the matter of the bankruptcy, as stated in the bill, had taken place, but alleged that this sale was made in pursuance of some arrangement between the said Plaintiff and the bankrupt; and he denied that the Plaintiff could be considered as a purchaser thereof, for full and valuable consideration, inasmuch as his purchase-money did not exceed four and a half years' purchase of the said premises: he submitted that the Plaintiff ought to be charged as mortgagee in possession, and that it would, upon a fair account, appear, that all the sums due to the said *Quintin Hamilton*, or to the said Plaintiff, on foot of the said mortgage debt, had been long since paid off and discharged by the perception of the rents and profits of the said premises: he denied that the said Plaintiff was entitled to hold the said premises freed and discharged from the equity of redemption; and submitted that such foreclosure could not have been effected by a summary order, in the absence of the parties entitled to the equity of redemption.

The cause was heard on the 1st of June, 1838, when a decree was pronounced, whereby it was referred to the Master to inquire and report what was the annual value of the lands, tenements, and hereditaments comprised in and conveyed to the Plaintiff, by the deed of assignment of the 7th of October, 1818, at the time of the sale thereof; and what was the value at such time of the life interest of the bankrupt, having regard to the situation thereof at that time, with respect to the deeds of the 25th of January, 1808, and the 24th of January, 1811.

From this decree the Plaintiff presented an appeal to

the House of Lords, assigning for reasons, that the reference directed by the decree was wholly immaterial and unnecessary with regard to the rights and interest of the said Plaintiff and the said Defendants in the matters in question in the suit: and that the decree ought to have declared, that the said Plaintiff was entitled to the sum of 1000*l.*, with interest as a charge upon the premises comprised in the said indenture of settlement, and should have contained proper directions consequential upon such declaration.

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 —  
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On the 20th of July, 1840, the cause was heard before the House of Lords, on which occasion their Lordships were pleased to reverse the decretal order of the 1st of June, 1838, and to declare that the Plaintiff became entitled by virtue of the assignment of the 7th of October, 1818, to the sum of 1000*l.*, under the deed of the 24th of January, 1811, in addition to the life interest of the bankrupt, *James O'Sullivan*, and that with this declaration the cause should be remitted back to the Court of Chancery(a).

The cause accordingly came on to be heard on the Lords' order, on the 26th of April, 1841, when a decretal order was pronounced, referring it to the Master to take an account of what was due to the Plaintiff on foot of the said sum of 1000*l.*, calculating interest on said principal sum from the day of the death of the bankrupt; and also of what would be due, upon the supposition that interest was not chargeable thereon; an account of all incumbrances affecting the said premises prior to and contemporaneous

(a) 7 Clark & F. 550.

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with, the Plaintiff's charge, and their respective priorities, was also directed, and all further directions were reserved until the return of the report.

On the 9th of January, 1843, the Master made his report, having taken the several accounts, as directed by the decree of April, 1841, and the cause now came on to be heard upon this report (which was unexcepted to), and merits and for further directions.

Mr. *Brooke* and Mr. *Brewster*, on the part of the Plaintiff, submitted, that he was entitled to the sum ascertained by the Master's report to be due, with interest, at the rate of six per cent., and pressed for a decree accordingly.

There was no appearance on the part of any of the Defendants.

*Feb. 7.*

*Judgment.*

THE LORD CHANCELLOR :—

I have given this case the more consideration, in consequence of its having been only argued on one side. There seems to have been a great deal of litigation about nothing. The estate was put into settlement in 1808 by a most informally prepared deed. By this deed, the estate was limited to the intended husband, *James O'Sullivan*, the younger, for life, and then, subject to a jointure of 100*l.* for the intended wife, to the use of the heirs male of the body of the intended wife by her intended husband, with remainders over; and particular care was taken that the jointure should be paid, for in the event of the settled lands proving insufficient, the jointure was secured upon other property. Then came the following proviso:

"And it is covenanted, granted, and agreed, by and between the said parties, that the said *James*, the second son, shall be at liberty to raise, by deed, mortgage, or by any other writing, a sum of 1000*l.*, to be applied to any purposes the said *James*, the second son, pleases, in case the said marriage shall take effect: but the said sum of 1000*l.* is not to be raised by way of the sale of said lands, tenements, or hereditaments aforesaid." Under this power, of course, the 1000*l.* could not be raised by sale.

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By a deed of appointment by way of mortgage, executed in 1811, for the purpose of securing a sum of 1500*l.* to a Mr. *Hamilton*, and in execution of the power in the deed of 1808, the said *James O'Sullivan* did give, grant, assign, make over, charge, and appoint, by way of mortgage or otherwise, pursuant to the said settlement, the said sum of 1000*l.* unto the said *Quintin Hamilton*, his executors, administrators, and assigns, with such powers and authorities to him and them to raise and levy the same as was given and granted unto the said *James O'Sullivan*, the younger, by the said recited settlement, or in any other way whatsoever, and when so raised and levied, to pay the same in and towards the payment of the said sum of 1500*l.*, and such the interest thereof, costs, charges, and expenses aforesaid, as should at the time of such raising and levying thereof as aforesaid, be then due, owing, and payable, but subject to the proviso that whensoever the sum of 1500*l.* and such the interest thereof, costs, charges, and expenses aforesaid should, by the receipt of the rents and profits of the aforesaid premises, or out of the said sum of 1000*l.* thereby granted, &c. It is singular that throughout the deed not one word is said as to interest

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upon the 1000*l.*, while every where it speaks of interest upon the 1500*l.* with great care, but without mentioning the amount of such interest. The lands were sold under an order in bankruptcy, and ultimately, in 1837, a bill was filed for the purpose of establishing the deed of 1811 as a good execution of the power created by the previous deed. The decree made in this Court was reversed upon appeal to the House of Lords, and the case was sent back here.

I do not understand why the question of interest was not then decided, without incurring the expense of a calculation, which, if the question be decided one way, would be altogether unnecessary.

It is said that the power only extended to charge the life estate, but it is absurd to suppose that the intention was to give a man the power of charging merely his own life estate. This settlement clearly authorized a charge of 1000*l.* upon the term, and, in my opinion, authorized the creation of that charge, with interest, although upon the subject of interest the settlement is silent. In the case of *Lord Kilmurry v. Geery*(a), it was held that if a man has power to charge land with any sum not exceeding 3000*l.*, he may charge it with 3000*l.*, and the interest besides. This case is stated more fully in the second volume of *P. Williams*(b). It has been followed by the decisions in *Boycot v. Cotton*(c), *Hall v. Carter*(d), *Lewis v. Freke*(e), and *Roe v. Pogson*(f), which is, I believe, the latest case on

(a) 2 Salk. 538.

(d) 2 Atk. 354.

(b) Cited in *Evelyn v. Evelyn*,  
 2 P. Wms. 671.

(e) 2 Ves. 507.

(c) 1 Atk. 552.

(f) 2 Madd. 457.

the subject. There Sir *Thomas Plumer* said, "where under a settlement a power is given to charge a sum in gross, it implies a power to give interest." The point does not now admit of any doubt. Here the power is "to raise by deed, mortgage, or any other writing, a sum of 1000*l*." A mortgage necessarily supposes the security of a principal sum with interest; the power, therefore, authorized the raising of the sum with interest; and it is clear, that whatever might be done under the settlement was accomplished by the deed of assignment. The words of the latter instrument are, "charge and appoint by way of mortgage:" it, therefore, operated as a mortgage of that principal sum, and it is consequently clear that it carried interest.

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It is said that this interest ought to be calculated at the rate of six per cent.; but where there is no contract as to the amount of interest to be paid, as I have decided on a former occasion<sup>(a)</sup>, the rate of the Court must prevail, viz. five per cent.: and as this gentleman had a life estate, which was subject to the charge with the inheritance, he must be considered to have kept down the interest during his life; and, consequently, interest can only be calculated from his decease at the rate of five per cent.

As to costs, my invariable rule is never to touch the costs of an appeal to the House of Lords. The Lords are the proper tribunal to dispose of their own costs. I never will give costs of an appeal to the Lords, unless I am directed by the House to do so. I do not mean to

(a) *Leslie v. Leslie*, Lloyd & G. temp. Sugden, 1.

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say, I should always apply this rule to family suits; I only allude to suits between adverse parties.

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*Decree.*

Declare the sum of 1000*l.* in the pleadings mentioned, with interest, is well charged upon the premises in the pleadings mentioned by the indenture bearing date the 24th of January, 1811, and that the rate of interest is to be at five per cent. per annum: and declare that such interest, during the life of the said *James O'Sullivan*, is to be deemed paid to the said Plaintiff by receipt of the rents: and declare that this Court adopts the calculation of the interest as in the said report, by which the Master has calculated the interest at five per cent. per annum: and let the Plaintiff have his costs of this suit, to be added to his debt, but not the costs of the appeal to the House of Lords: and let the Master carry on the account upon the same principle, upon which the former account has been already taken. Refer it to the Master in this cause to appoint a fit and proper person to be receiver of the rents and profits of the said premises in the pleadings mentioned; and let such receiver pay the surplus rents to the Plaintiff in discharge of the sum remaining due to him, and costs, from time to time, until further order: and let all parties be at liberty to apply as they may be advised: and let the Master be at liberty to make a separate report as to the said receiver.

*Reg. Lib.* 87, fol. 199, 1843.

BARTON v. HASSARD.

1843.

**RICHARD HASSARD**, the testator in this case, by his will, dated the 26th of January, 1813, bequeathed legacies to *Sarah Hassard, Frances Hassard, Jane Fiddes, Mary Jane Nixon*, and several other persons, and appointed *George Hassard, Jason Hassard, and William Hassard*, his executors.

*George Hassard* alone proved the will, and acted under its trusts; and on the 19th of December, 1815, the present suit was instituted for the administration of the testator's estate.

After the filing of the bill, *George Hassard* alleged that the assets would not be sufficient to satisfy the debts and legacies of the testator; and by means of this representation induced the legatees above-named to compound with him for their legacies. Accordingly, by indenture dated the 29th of November, 1820, the said named legatees assigned their respective legacies to a person named *George Williams*, as the trustee of *George Hassard*. These assignments were made in consideration of sums considerably less in amount than the legacies, to which the several assignors were entitled.

*Feb. 13.*  
An executor contracted with legatees for the purchase of their legacies, which were accordingly assigned to a trustee for him, in consideration of sums of money less in amount than the legacies. It was admitted that the transaction could not be sustained for the benefit of the executor:—*Held*, that the deed of assignment did not operate as a release of the estate, and could not be upheld as against the legatees, who executed it, for the benefit of their co-legatees.

The Master, by his report, after stating the foregoing facts, found that the executor, *George Hassard*, had not any power enabling him to enter into the contract contained in the deed of 1820, for his own benefit, and submitted as a special point for the consideration of the Court, whether the said legatees were bound by their



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Statement.

contracts so as to be entitled, upon foot of their legacies, merely to the sums, which they had agreed with the executor to take in satisfaction of their legacies, or whether they were to be considered entitled to the full amount of their bequests.

Argument.

The *Solicitor-General*, Mr. Monahan, and Mr. J. J. Murphy, for legatees not parties to the deed of 1820, contended that the estate of the testator was entitled to the benefit of the contract of 1820, and that the deed operated as a release of the estate. *Ex parte James(a)* was referred to.

Mr. Serjeant Keatinge and Mr. James Haire for the legatees who had assigned their legacies.

Mr. Moore, for the executor, George Hassard, admitted that the purchase could not be sustained.

Judgment.

THE LORD CHANCELLOR:—

This case comes before the Court in a very irregular manner; and I shall take some steps to put an end to this inconvenient practice of reporting special points.

It appears that some twenty-three years ago *George Hassard*, the executor, represented the testator's assets as an insufficient fund to meet the full amount of the debts and legacies; and that some of the legatees sold to him their legacies for sums considerably less in amount. The deed, by which the transaction was carried into effect was not a release of the estate, but a direct and formal assign-

(a) 8 Ves. 337.

ment of the legacies in trust for the purchaser. The Master has rightly considered, that the executor could not sustain this purchase, which was clearly made by him in his fiduciary character ; but persons, who were legatees, standing in the same interest with the legatees who sold their legacies, desire to have the benefit of the executor's purchase, and insist that they are entitled to treat the assignment as if it had been a release ; and the question now is, are they so entitled ?

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As to the case of *ex parte James(a)*, which was referred to, the contest there was between the general creditors and the solicitor, who had made the purchase, and it stands upon grounds distinct from this case. If a man, who, like this executor, is invested with a fiduciary character, buys up an adverse claim, he at once becomes, in respect of that purchase, a trustee for the parties in whose behalf he is clothed with that character. But this executor's fiduciary character extended to all the legatees. Must I then not remit the legatees, who joined in the deed of assignment, to their former position ? This Court cannot give effect to this deed against those legatees who assigned for the benefit of their co-legatees. There is no principle, upon which these co-legatees, who were no parties to that instrument, can insist on its being upheld for their advantage. The benefit of the purchase must belong to the persons who assigned, subject to the payment of the principal and interest paid by the executor. It is not like the purchase of an outstanding incumbrance at less than its value, which would enure to the benefit of the estate.

(a) 8 Ves. 337.

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## BURT v. BERNARD.

*Feb. 10, 13.*  
 In 1828 a judgment was obtained against a trader upon a bond, and warrant of attorney collateral. On the 3rd of March, 1841, the judgment creditor having presented a petition for the appointment of a receiver, under the Statute 5 & 6 Will. IV. c. 55, obtained a conditional order for the purpose, which was subsequently made absolute on the 23rd of April. On the 17th of March, in the same year, the trader committed an act of bankruptcy, and on the 17th of May a commission issued, under which he was duly found a bankrupt. Upon motion by the assignee for the discharge of the receiver:—  
*Held*, upon appeal, confirming the order at the Rolls, that it was the absolute and not the conditional order that attached the rents; and that, consequently, as the judgment creditor was not in the position of a creditor having “an execution executed,” that the receiver should be discharged.

**THIS** was an appeal from an order of the 17th of January, 1842, pronounced by His Honor, the late Master of the Rolls.

It appeared that in the year 1828 Burt (the Appellant) obtained a judgment for the sum of 1156*l.* 17*s.* 10*d.* against *A. B. Bernard*, who was then a trader, upon foot of a bond, with warrant of attorney for confessing judgment. On the 3rd of March, 1841, *Burt* presented his petition under the Statute 5 & 6 Will. IV. c. 55, and obtained a conditional order for the appointment of a receiver. This order was made absolute upon the 23rd of April following, and a receiver was accordingly appointed. On the 17th of March, 1841, *Bernard* committed an act of bankruptcy, and on the 17th of May, in the same year, a commission of bankruptcy issued against him, under which he was duly found and declared a bankrupt.

In this state of circumstances the assignee of the bankrupt applied to have the receiver discharged, and His Honor granted the motion. From this order the present appeal was brought on the part of the judgment creditor.

The argument at the Rolls, and the judgment of His Honor, are reported by Messrs. *Flanagan* and *Kelly*(*a*).

Mr. Serjeant *Warren*, Mr. *Collins*, and Mr. *A. J. Maley*, for the Appellant.

(*a*) Flan. & K. 414.

The *Solicitor-General* and Mr. *Herrick* for the assignee.

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—  
Argument.

The arguments on the appeal were the same as those urged in the Court below. The cases referred to were *Barry v. Wilkinson*(a), *Coleman v. Mason*(b), *Baker v. Petigrue*(c), *Lord Sligo v. O'Malley*(d).

THE LORD CHANCELLOR :—

Judgment.

This is a question of considerable importance, and I shall not dispose of it at present. There are high authorities on each side; but the difficulty which I entertain is, whether either of the decisions be correct. The Legislature did not contemplate the manner in which the Courts have dealt with the directions of the Act(e): it evidently had in view the making of only one order; therefore, it speaks of "the order," as if one order was to execute its purposes. As the framers of the Act contemplated one order being made, they accordingly provided, that it should contain a direction to the tenants to pay their rents to the receiver: therefore, in carrying out the provisions of the Act, the Court must either make an order in chamber *ex parte*, according to the present practice, in which case the order must necessarily be conditional: or there must be a formal hearing upon the petition (which would be attended with much expense), and, in that case, there would be a regular order pronounced, and that order would probably not contain a direction to the tenants to pay their rents to the receiver:

(a) 3 Ir. Eq. R. 121.

(b) 4 Ir. Eq. R. 421.

(c) 2 Ir. Eq. R. 144.

(d) Flan. & K. 300; 3 Ir. Eq. R. 527.

(e) 5 & 6 Will. IV. c. 55.

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for as it should go to the Master to approve of the person to be appointed receiver, to measure the security, and ascertain what were the lands over which the receiver was to extend,—in other words, to carry out the consequential directions, even in that case there would be a different direction in the order made in the first instance, from that which the Act of Parliament contemplated: therefore, even if there had been a regular hearing upon each petition, a second order would still be necessary. However, if there were a hearing, the order might be absolute in the first instance; but as this jurisdiction is exercised in chamber, the first order is necessarily an order *nisi*.

Now this is an order, calling upon the party to come in and shew cause, why it should not be made absolute, and if no cause is shewn, or if the cause is disallowed, in the former case a side-bar rule is entered, and in the latter, an order is made in Court, directing a reference to the Master to approve of a proper person to be appointed receiver, and to select a competent part of the lands in the petition mentioned for the purpose. The Master executes the directions of the reference, and selects the particular denominations, over which the receiver is to go, and then the matter comes back again to the Court, when the third order is pronounced by a side-bar rule, by which the Court directs the tenants to pay their rents to the receiver; and then, for the first time, is there an order made, answering the terms of the Act of Parliament; for this is the only order that contains a direction to the tenants to pay their rents to the receiver; and this is what the Legislature referred to in the thirty-third section, where the order is spoken of. If, therefore, there be no relation back to the

conditional order, it appears to me, that the order, which the Act of Parliament meant, was the third order.

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In the conflicting decisions upon the question, one Court held that the conditional order attached the rents and bound the property, and the other, that it was the absolute order that did so ; and observations were made as to the consequences of adopting either ; but, in fact, the Act of Parliament did not contemplate more than one order being necessary to carry out its provisions, and such an order could only have been made by giving notice to the party sought to be affected by the order, and requiring him to appear in Court. The Act treats the order which is to bind the property as an execution executed, and the intention of the Legislature obviously was to save expense ; that if a party was entitled to issue an *elegit*, he should not be forced to bring his ejectment, and obtain an inquisition : but nothing beyond this was intended.

Formerly, if the creditor issued an *elegit*, he could not have known what lands were bound by his judgment, until he had obtained an inquisition ; whereas now, by the reference to the Master, the particular denominations of the lands, out of which his debt is to be paid, are ascertained. The Act meant to substitute something for the *elegit* and the inquisition ; something in lieu of the proceeding at law. Is it not probable, therefore, that it intended what was closest in analogy with the proceeding at law ? and is not the appointment of the receiver by the Master the act nearest and most closely analogous to the ejectment and inquisition ? Again, the conditional order is one, that may never be proceeded on. It is the mere act of the parties, and it is perfectly optional with them,

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whether or not they will ever make it effectual; whereas the absolute order involves the necessity of proceedings being taken upon it; it is binding upon the parties; it is an act done:

My present impression, therefore, is, that the conditional order is not the order which carries out the purposes of the Act, and, therefore, is not the order which binds the rents. But I do not mean to dispose of the case at present. It may not be necessary to decide in this case between the absolute order and the third order, in consequence of the act of bankruptcy having been committed before the conditional order was made absolute.

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*Feb. 13.* THE LORD CHANCELLOR:—

The point in this case is of very great importance. It is, whether the conditional order, or the absolute order for the appointment of a receiver, is to be considered the order, which binds the property. It appears that the conditional order was made on the 3rd of March, 1841; the act of bankruptcy was committed on the 17th of March; then came the absolute order on the 23rd of April; and lastly, the commission of bankruptcy issued on the 17th of May, which does not affect the right of the judgment creditor, if the conditional order be the order which binds the property. I have to decide between great and conflicting authorities. The late Master of the Rolls decided that the second, or absolute order, was the order which binds the property. The Court of Exchequer<sup>(a)</sup> deter-

(a) *Barry v. Wilkinson*, 3 Ir. Eq. R. 121.

mined that the first, or conditional order, was the order which is binding under the Act of Parliament. Each Court has, on subsequent consideration, supported its prior decision. It is not, therefore, to be expected that there should be at present any agreement of opinion between the two Courts, otherwise I should be very much disposed to ask for the assistance of the Master of the Rolls, and two of the Judges of the Court of Exchequer, in order to induce the two Courts to agree on this point if possible; but as the matter stands at present, feeling, as I do, equal respect and deference for both, I must decide after a careful consideration of the Statute.

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The matter depends wholly on the Act of Parliament, for the authority of the Court to appoint a receiver rests altogether on it. It has no power, of its own jurisdiction, to make such an order. The Act of Parliament gives the power to appoint a receiver, where an *elegit* might have issued. In order to obtain a receiver under the Act, the party must be in a capacity to sue out an *elegit*. Therefore, if necessary, the judgment must be revived, and in all cases the Court will require affidavits to shew that a case is made, which will enable the Court to act in some measure *ex parte*, as it does under this Statute. The intention of the Legislature was, that where an *elegit* could be issued, no further expense should be incurred, no ejectment, no inquisition, but that the party should at once have a short remedy in a Court of Equity by the appointment of a receiver. Now I think, looking at this intention of the Legislature, that there ought to be some act in this Court, equivalent to what formerly took place at law. The Legislature intended that there should be, if I may use the term, an equitable execution executed, in lieu of the



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legal inquisition, &c., which would have taken place at law.

The material clauses of the Statute are the thirty-first, thirty-second, thirty-third, and thirty-seventh. The thirty-first section enacts, "that after the commencement of this Act, no grant in custodiam for recovery of any debt or demand, shall be made, save in trust for His Majesty, and for a debt due to the Crown; and it shall be lawful for any person entitled to sue out, or who has already sued out, a writ of *elegit* upon any judgment recovered in any of His Majesty's Courts at Dublin, or to issue, or who has issued, execution in any suit or proceeding on any recognizance there, to apply by petition to the Court of Chancery, or to the Court of Exchequer at the equity side thereof, for an order that a receiver may be appointed of the rents and profits of the entire, and not of a moiety only, of all lands, tenements, or hereditaments, which he would be entitled to have extended or appraised under a writ of *elegit*, or extended, seized, or taken under a writ of *levari facias*, or other proceeding on such recognizance; or to have a receiver thereof appointed by that Court extended to that matter; and it shall be lawful for the Court to appoint and extend a receiver accordingly over the whole thereof, or over so much thereof as shall appear to be sufficient for the purpose of paying the sum due on such judgment or recognizance." Then come these material words: "And every such petition shall state the judgment or recognizance, and the sum due thereon, and shall be verified by the affidavit of the person interested, or such other affidavit as the Court shall direct, stating the sum due for principal, interest, and costs, over and above all just and fair allowances; and it shall be lawful

for the said Court to require proof by the affidavit of the party applying for such order, or by such other affidavit, or affidavits, or evidence, as it shall require of the particulars and annual rental, or value of the lands, over which such receiver shall be sought." Under this section then the Court has power to make an order, appointing a receiver over the whole of the lands of the debtor, the facts required by the Act having been established by certain evidence; and it is clear that the Act contemplated but a single order. Passing over the thirty-second section, I will now go to the thirty-third, and let us see what are the requisites of this order. That section directs, "that in every order made for the appointment of a receiver as aforesaid, the tenants shall be required to pay him all rents due, or which shall become due by them, for or in respect of the lands mentioned in such order; and every such order shall require the receiver to enter into security, by himself and two securities, to such amount as shall be therein specified, and such further security as the Court shall from time to time direct for the due performance of his duties," &c. So that every order for the appointment of a receiver must contain these two requisites, a direction to the tenants to pay their rents to the receiver, and a specification of the amount, for which the receiver and his sureties shall enter into the recognizance. This shews clearly, that the Legislature contemplated that the whole was to be done by an order, and that that order, to be valid under the Act of Parliament, must contain these particulars. The Court is enabled by a particular order to issue, what I may call, an equitable execution. The Act of Parliament requires every order to contain a direction to the tenants for payment of the rent to the receiver, and on the other hand binds the receiver to enter into the

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recognizance; and then it contains a direction that the tenants shall not be served with the order, until the receiver has bound himself properly by the recognizance. It is my opinion, therefore, that the Legislature contemplated but one order, and a perfect one, in which all the matters made requisite by the Act of Parliament were to be contained, and therefore, unless the Act be considered as merely directory in this respect, I do not see how this Court, exercising a jurisdiction distinct from the original jurisdiction, and derived only from the Act, can issue a binding order, unless it complies with all the requisites of the Act.

The thirty-second section is very important on this question; for it enables the Court to make an order, giving the personal representative, or assignee of the first petitioning creditor, the benefit of the proceedings, and the Court is authorized to make such an order, unless good cause is shewn to the contrary within some time to be specified in such order. So that in making the appointment of a receiver, the Court is required, by the Act of Parliament, to make an order, which shall operate at once: and in another stage of the proceedings the Statute expressly directs the Court to issue a conditional order, and to make it absolute, or discharge it, upon hearing the parties. The Legislature, therefore, very well worked out its own purpose. Where an absolute order is required, it is made final and conclusive. Where a conditional order is required, the Act of Parliament expressly provides for that conditional order being made absolute.

Now the question, which I have particularly to decide, depends on the thirty-seventh section. That section enacts, "that in determining the priority of the demands of cre-

ditors, the Court, in which any question respecting such priority shall arise, shall not give to the demand of any creditor priority over the demand of another, in consequence of his having obtained an inquisition on an out-lawry, or other proceeding taken by him, but shall determine such priority, as if no such inquisition was had; and every creditor, who shall obtain an order for the appointment of a receiver under the provisions of this Act, shall be considered as a creditor, who has issued and executed an execution on his judgment or recognizance from the date of such order, and so as not to be affected by the bankruptcy of his debtor, further or otherwise than he would be, if his debtor became bankrupt after execution executed." This clause puts the order of this Court for the appointment of a receiver upon the footing of an execution executed. Must I not, therefore, see that this order, coming as it does in lieu of an execution, and giving the same benefit, without the same expensive process, complies as nearly as may be with the requisites of the Act of Parliament, and binds the property, by analogy, to the proceedings at law? The whole clause strongly impresses my mind with the conviction, that the Legislature were looking to something, which, without incurring the same expense, would be in substance tantamount to that remedy, which could only have been obtained at law by a more circuitous process. I think that nothing can supply that but the actual order for the appointment of a receiver, and the order, which makes that appointment, is the order which complies with all the terms of the Act of Parliament.

Before I observe upon the mode in which the provisions of the Act are executed by the Court, I will refer to the

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Statute of Victoria<sup>(a)</sup>, to shew how the Legislature by that enactment carried out the same object. The same power is given to the Court for the appointment of a receiver in a summary way, as existed under the prior Act; and then after having made judgments a charge upon stock, &c., comes the provision in the twenty-fourth section, enabling the Court to make an order *ex parte* to prevent the transfer of such property, until the order shall have been made absolute; and then a direction, that the party, against whom such a conditional order shall have been made, is not in the meantime to have the power of dealing with or transferring the property sought to be affected by the order; and then the Court is to make the order absolute, or discharge it, as it may think right. So that where the Legislature meant that the order should be absolute, they have given full expression to their intention, and where they meant that the order should be conditional, they have so expressed it, and have prevented the person, against whom such an order has been pronounced, from disposing of the property in the meantime, and have enabled the Court either to discharge the order, or make it absolute. Neither Act of Parliament has left the Court the power or discretion to make either a conditional or an absolute order, in the sense in which the words are generally used; but each has pointed out when a conditional order, and when an absolute order, is to be made.

In carrying out the provisions of the first Act, this Court, finding that it directed certain requisites, felt that justice demanded that the party, against whom the receiver was to be appointed, should have an opportunity of

(a) 3 & 4 Vict. c. 105.

being heard, and that the case should not be decided in his absence. The way which the Court adopted was this, first, to issue what is called a conditional order, which states that a petition has been presented to the Chancellor, verified by an affidavit, and which directs the Master to appoint a receiver over the lands, or a competent part thereof, unless in ten days cause be shewn to the contrary. If cause be not shewn, an order is made directing a reference to the Master to appoint a receiver, and to state the sum for which the receiver is to enter into the recognizance, and to select the lands over which the receiver is to be appointed. This is the absolute order, although it does not comply with the terms of the Act of Parliament, for it neither contains the direction to the tenants to pay the receiver, nor does it specify the sum for which the receiver is to enter into the recognizance, which the Act of Parliament expressly requires that it should. Although it does not comply with the requisites of the Act of Parliament, it is an absolute order. Then the Master makes his report, and a side bar rule when made in Term (I understand so too, even when made out of Term, though it should certainly, in the latter case, be made on petition), is obtained, confirming the Master's report, and appointing the receiver over the particular lands specified, and directing the tenants to pay, and specifying the sum, for which the receiver is to enter into the recognizance; and that, undoubtedly, is the order which, for the first time, complies with the requisites of the Act of Parliament. It was contended before me that the order which is binding under the Act of Parliament is the conditional order; but nobody attempted to contend that it bound the property, unless it was followed up by another order: therefore, it is not an order which,

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*Judgment.*

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 ———  
*Judgment.*

of itself, binds the property; it is not an execution executed. You must, at all events, wait to see whether the parties ever intend to come in to make it absolute. It depends upon them, and not on the Court, whether it ever is to be an execution executed. It is admitted on all hands that the Court must wait for some time before the conditional order can be considered an execution executed. What time is the Court to wait,—six days, six months, or six years? It is said that the Court will prevent any abuse of the order, and, no doubt, it will; but I want to know, when does the order come into operation? Does it not depend wholly on a third person, whether it ever does so or not? It is clear, therefore, that the mere issuing of this order is not, and cannot be considered a compliance with the Act of Parliament.

How then is it to be made good by relation? What has relation to do with the matter? The conditional order is issued for the purpose of bringing the machinery of the Act of Parliament into operation in the case. The first order is pronounced that the parties may have notice, that, unless cause be shewn within ten days, the order for the receiver will be made. This is merely to carry the intention of the Legislature into effect, and to do justice between the parties. Suppose, instead of the issuing a conditional order, as at present, this Court, in the exercise of its judicial consideration, were to fiat the petition thus, "Let notice be given to the party that, unless he shew cause within ten days, an order for the appointment of a receiver will be made." Will any person argue that this fiat could be considered as an execution executed, or that it amounted to anything but notice? Suppose, instead of the present chamber practice (which does

not take place in the Court of Exchequer), this Court should direct all parties to have notice, and to come prepared with the names of the denominations, the value of the property, and sufficient facts so as to enable the Court to make but one order, and that a perfect one? Can any one deny that I have power to make such a fiat?—and could it be argued that such was anything but notice? Why should the course, which the Court adopts to give the parties notice and to save expense, be held to give the judgment creditor so great an advantage, which the Legislature never intended to give him? My opinion, therefore, is, that the conditional order is not “the order” properly so called, but is merely notice to the party that an order will be made, unless he shews cause against it. At all events, I am very sure that the conditional order is not an execution executed within the meaning of the Act of Parliament.

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—  
*Judgment.*

I have been furnished with papers, which shew the practice in the Court of Exchequer, and I am not very much surprised that that Court should have come to a different determination, though I doubt its correctness. I speak with the greatest possible respect, and I should very much hesitate as to any opinion of my own, which might be opposed to the opinions of the learned persons, of whom that Court is composed. Their course is different: first, an order *nisi* is obtained; then there is a second order, which directs the receiver to be appointed over the particular lands, and that the receiver shall enter into security for a specified sum, to whom the tenants are to pay their rents, on being served with a further order after the recognizance is entered into. Both these orders are made in open Court. The receiver perfects the security, and



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v.

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Judgment.

then a side-bar rule is entered, directing the tenants to pay their rents to the receiver. I think it very likely that the form of these proceedings has led to the disagreement between the two Courts; but whatever may be the foundation of it, I am satisfied that the conditional order is not the order meant by the Act of Parliament. I shall have the second order in this Court altered so as to avoid any question in future between the second and third orders. It is only necessary for me here to decide, that the conditional order is not the order attaching the rents. I think, therefore, that the late Master of the Rolls came to a sound conclusion, and I affirm his decision; but owing to the great importance of the question, I shall not give any costs.

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DAVIS v. ROWAN.

Feb. 11.

Frame of decree in a suit for foreclosure and sale, where there are mortgages before the Court, puisne to that of the Plaintiff.

THE bill in this case was filed for a foreclosure and sale. The Plaintiff's mortgage bore date the 12th of July, 1839.

Mr. Cogan, on behalf of three of the Defendants, *Francis Rowan, James Roche, and John Reynolds*, claiming under a subsequent mortgage of the 17th of August, 1839, applied to have the decree so framed, that the account directed might extend to their subsequent mortgage. The Lord Chancellor, after consulting with the Registrar, directed the decree to be drawn up as follows:—

Decree.

Refer it to the Master, to take an account of what is due to the Plaintiff for principal, interest, and costs, on

foot of the deed of mortgage in the pleadings mentioned, bearing date the 12th of July, 1839, and judgment collateral therewith: and let the said Master also take an account of all charges and incumbrances affecting the said mortgaged lands and premises, prior to and contemporaneous with the said indenture of the 12th of July, 1839: and the Defendants, *Francis Rowan, James Roche, and John Reynolds*, by their counsel so requiring, let them be at liberty to file a charge in respect of their mortgage, bearing date the 17th of August, 1839, in the pleadings mentioned, for the purpose of attaching the surplus funds, if any, which may remain after satisfying prior demands: and in case the Defendants shall file such charge, let the Master be at liberty to make a separate report of what may be due to the said Defendants and to the incumbrancers, if any, intervening between the 12th of July, 1839, and the 17th of August, 1839: and let the Defendants, and all persons, to whom any sum may be found due by said separate report, be at liberty, from time to time, to apply in relation to any such surplus funds: and let the said Master report the relative priorities of the demands, which may be proved under this decree, or by virtue of the General Order bearing date the 22nd of June, 1842, before him: and the said Master is to cause advertisements to be published in such of the public papers, as he shall think proper, for all persons having such charges and incumbrances affecting the said mortgaged lands and premises to come in before him, and prove the same: and for the better taking of the said accounts, and discovery of the matters aforesaid, the parties are to produce before the Master, on oath, all deeds, &c. &c.: and reserve further directions and costs.

*Reg. Lib. 87, fol. 228, 1843.*

1843.

DAVIS  
v.  
ROWAN.  
—  
Decree.

1843.

*In Re M'DERMOTT, a Lunatic(a).*

Feb. 10.

A lunatic, who had been convicted of an assault, but the period of whose imprisonment for the offence had expired, ordered to be transferred to such private asylum, as the committee of the person, with the approbation of the Master, should direct.

IN this matter a petition was presented on the part of the committee of the person and fortune of the lunatic, stating that the lunatic was at the time resident in the District Lunatic Asylum of Ballinasloe, to which place he had been removed, by virtue of a warrant from the Lord Lieutenant, from the gaol of Leitrim, where he had been sentenced to be imprisoned for an assault. The petition stated that the petitioner being desirous to remove the lunatic to an Asylum near the city of Dublin, where his state of health and comforts could be better attended to, had caused various applications to be made to the Governors and Manager of the said Asylum to permit the lunatic to be given up to his care and custody; but that the Governors and Manager had refused to deliver up their charge unless authorized by the Lord Lieutenant, or by a special order of the Lord Chancellor.

The petition accordingly prayed that the Governors and Manager of the Asylum might be ordered to deliver up to the petitioner the person of the lunatic, the petitioner being ready and thereby offering to pay all sums of money lawfully due or payable to the said Governors for the maintenance of the lunatic.

Mr. *T. M'Dermott* now moved the prayer of the petition and referred to the 1 & 2 Vict. c. 27.

The *Solicitor-General* appeared for the Crown, and informed the Court that the period, for which the lunatic had been sentenced to be imprisoned, had expired.

(a) Ex relatione.

The LORD CHANCELLOR said, he would make an order that the Governors of the Asylum, where the lunatic at present resided, should deliver him up, to be placed in such asylum in or near Dublin, as the committee of the person, with the approbation of the Master, should appoint: and that the expenses of the commission and of the removal of the lunatic should be paid out of his estate.

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M'DERMOTT.  
Judgment.

" Let the Governors and Manager of the District Lunatic Asylum at Ballinasloe, at the expense of the estate of the lunatic, deliver the person of the said lunatic at such private asylum in or near Dublin, as the committee of the person of the said lunatic shall, with the approbation of the Master in this matter, direct: and refer it to the Master to tax the costs of issuing and executing the commission in this matter and incident thereto: and let such costs be paid out of such funds of the said lunatic, as the said Master shall certify to be properly applicable thereto: and let due notice of attending the said Master on the taxation of such costs be given to such person or persons as would be entitled to a distributive share or distributive shares of the said lunatic's estate, in case he were now dead intestate."

Order.

1843.

## HUGHES v. KELLY.

*Feb. 13, 14.*  
By deed executed in the year 1809 certain lands were conveyed, subject to the payment of a sum of money, which the grantees thereby covenanted with the grantor to pay to third persons:

—*Held*, that, notwithstanding the covenant, only six years' arrears of interest could be recovered.

*Held*, also, that though by the deed of 1809 there was an obligation imposed, yet there was not a trust created.

The Statute 3 & 4 Will. IV. c. 27, s. 42, is not repealed by the 3 & 4 Vict. c. 105, s. 32.

The provisional assignee of an insolvent Defendant is not entitled to his costs against the Plaintiff.

BY indenture bearing date the 23rd of January, 1809, and made between *Thady Kelly* of the one part, and his son, *William Kelly*, of the other part, after reciting several denominations of lands in the County of Sligo, and the several leases, under which same were held by the said *Thady Kelly*, the said deed witnessed that for and in consideration of the natural love and affection which *Thady Kelly* bore unto his son, *William Kelly*, and of ten shillings, and also for the other considerations therein after mentioned, the said *Thady Kelly* granted and released all the said premises unto *Wm. Kelly*, his heirs and assigns, to hold the same subject to the payment of the head-rents and fines reserved and made payable by the several indentures of lease therein recited, and subject also to the payment of 260*l.* unto the said *Thady Kelly* in each and every year during his natural life, and also to the payment of 1100*l.* as and for the fortunes of *Elizabeth Kelly* and *Anne Kelly*, the daughters of *Thady Kelly*, on their respective days of marriage, in the following proportions; that is to say, to pay unto *Elizabeth Kelly* 600*l.* and unto *Anne Kelly* 500*l.*, in such manner and under such restrictions as *Thady Kelly* should by writing under his hand and seal, or by his last will and testament, direct and appoint: and the said *William Kelly* did thereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said *Thady Kelly*, that he, *William Kelly*, his heirs, &c., should well and truly pay unto the said *Thady Kelly* in each and every year, during the term of his natural life, the sum of 260*l.* sterling, by half-yearly payments: and

further, that he would well and truly pay unto the said *Elizabeth Kelly* and *Anne Kelly* the said sum of 1100*l.* sterling, in such proportions as hereinbefore mentioned, in such manner and under such restrictions as the said *Thady Kelly* should direct and appoint.

1843.

HUGHES

v.

KELLY.

Statement.

Immediately upon the execution of this deed, *William Kelly* entered into the possession of the lands and premises thereby conveyed; and in 1837 the said premises were granted, by way of mortgage, to the Plaintiff in this cause, who was one of the public officers of the Agricultural Bank, to secure a sum of 2000*l.*; the bill in the present cause was filed to raise the amount of that mortgage.

On the 16th of December, 1841, a decretal order was pronounced, whereby the cause was referred to the Master to take the usual accounts.

On the 18th of January, 1843, the Master made his report, and thereby, after stating the conveyance of the 23rd of January, 1809, and that *William Kelly*, immediately upon its execution, had entered into the possession of the said premises, found that *Thady Kelly* had died in the month of December, 1813, without having in any way appointed said sum of 1100*l.*, or any part thereof: that on or about the 1st of January, 1822, *Anne Kelly* had intermarried with *Edward M' Lester*, and that upon such intermarriage the said *Anne*, and the said *Edward M' Lester* in her right, became entitled to the said sum of 500*l.* together with an arrear of interest thereon, amounting to the sum of 485*l.* 14*s.* 3*d.*, being the entire amount, at the rate of five per cent. from the 1st of January, 1822, to the date of the report.

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Statement.

To this report an exception was taken on the part of the Plaintiff, on the ground that the Master should not have calculated interest from the 1st of January, 1822, but should have reported that *M<sup>r</sup> Lester* and wife were entitled to interest upon said principal sum only for six years next preceding the filing of the bill.

Argument.

The *Solicitor-General* and Mr. Serjeant *Warren* in support of the exception.

This case falls within the forty-second section of the Statute 3 & 4 Will. IV. c. 27, and the Master ought to have reported that *M<sup>r</sup> Lester* and his wife were only entitled to an arrear of interest for six years prior to the filing of the bill. On the other side, it will be contended, that by the operation of the deed of the 23rd of January, 1809, an express trust has been created for the payment of this sum, and that consequently they are within the saving of the twenty-fifth section; or that, secondly, in consequence of there being contained in that deed a covenant on the part of *Wm. Kelly* to pay this sum, upon which the parties now entitled could, by the operation of the thirty-second section of the 3 & 4 Vict. c. 105, at any time within the period of twenty years, bring an action, this Court must follow the law, and hold the parties to be entitled to whatever amount of interest, they could have recovered under the covenant.

With respect to the first argument, even admitting, for a moment, this to be the case of an express trust, the exception in the Statute in favour of trusts only applies to cases, where the principal is in controversy, but has no application to a case, where the amount of interest to be

recovered upon an admitted principal sum is disputed : such a case is governed exclusively by the forty-second section, upon which the twenty-fifth section does not create any exception, *Burne v. Robinson*(a). But, independently of this, it is impossible to maintain that the deed of 1809 created any trust, much less an express trust, for the payment of this money. *Kelly*, the grantee in that deed, took the property subject to an obligation, which the parties might have enforced to the full extent, if they had thought fit to come within the proper time. But that never could be said to have converted *Kelly* into a trustee for these parties : at the most, it is but a constructive trust, to which case it has been decided that the exception in the twenty-fifth section does not apply, *Salter v. Cavanagh*(b). With respect to the second argument, founded upon the supposed operation of the thirty-second section of the 3 & 4 Vict. c. 105, upon the forty-second section of the 3 & 4 Will. IV. c. 27, it is submitted that this cannot be sustained. The sections of the two Acts are not necessarily inconsistent with each other : the one, the later, relates to the principal only of the debt, and is silent altogether respecting interest, which appears to be provided for by the fifty-third section ; while the forty-second section of the earlier Act respects merely the arrears of interest to be raised. The Acts themselves, though in *pari materia*, relate to different subjects : the one, to suits to recover money out of the land ; the other, to personal actions against the party covenanting. The Statutes may, in this way, be well construed together ; and this Court ought not to put a construction upon the later Statute, which would, in point of fact, reduce the

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Argument.

(a) 1 D. & Walsh, 688 : see      (b) 1 D. & Walsh, 668.  
*Ward v. Arch*, 12 Sim. 472.



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Argument.

former one to a complete nullity, unless the enactments were in themselves so clear and express as to admit of no doubt upon the subject. It is impossible to conceive that the Legislature could have intended to have thus indirectly repealed the forty-second of the 3 & 4 Will. IV. c. 27, by the thirty-second of the 3 & 4 Vict. c. 105, yet the argument, in point of fact, must amount to that. In *Harrison v. Duignan*(a), which was a suit to raise the arrears of an annuity, though there was a covenant for the payment of the annuity, your Lordship limited the account to the period of six years prior to the filing of the bill.

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Mr. *Monahan* and Mr. *H. G. Hughes* in support of the report.

By the deed of 1809 the lands in question were conveyed expressly subject to the charge of 1100*l.*: a trust was therefore created for the payment of that charge, and the grantee in the deed thereupon became a trustee for the parties beneficially entitled thereto. To such a case it has been repeatedly decided that the Statute of Limitations has no application, *Fergus v. Gore*(b), *Morse v. Langham*, stated in the judgment of Sir *Thomas Plumer* in *Burke v. Jones*(c), *Hargreaves v. Michell*(d), *Hughes v. Wynne*(e). It will be said that those cases were decided, before the recent Statute 3 & 4 Will. IV. c. 27, was passed; but it has been held since the Statute, that the inherent jurisdiction of Courts of Equity in cases of trusts still remains, and that the right to give relief in such cases is unaffected by the Statute;

(a) Vol. ii. p. 295.

(d) 6 Madd. 326.

(b) 1 Sch. &amp; L. 107.

(e) Turn. &amp; R. 307.

(c) 2 Ves. &amp; B. 286.

*Kelly v. Kelly*(a), *Dillon v. Cruise*(b). In *Phillipo v. Munnings*(c), a trustee was held bound to account for a breach of trust after an interval of more than thirty years. This demonstrates that the Statute does not apply to cases of express trust, within which class the present case comes. It is not a trust deducible merely from the nature of the transaction, or superinduced by operation of law, as some matter of equity, independently of the particular intention of the parties; but it is a trust created by the direct act of the grantor himself, and appears upon the face of the conveyance of 1809. Supposing, however, that the case came originally within the forty-second section of the 3 & 4 Will. IV. c. 27, we submit that by force of the thirty-second section of the 3 & 4 Vict. c. 105, the case is taken out of the operation of the earlier Statute, and that we are entitled to the same amount of interest as could have been recovered upon the covenant. By that section, which accurately corresponds with the third section of the English Act, 3 & 4 Will. IV. c. 42, the right of the creditor to bring an action of covenant at any time within twenty years is preserved: the forty-second section of the earlier Statute, therefore, is virtually repealed by the later Act; *Paget v. Foley*(d). In *Strachan v. Thomas*(e), it was held, that an action of debt upon a covenant, in an indenture granting an annuity, might be brought within the period of twenty years limited by the 3 & 4 Will. IV. c. 42. In *Paget v. Foley*, Chief Justice *Tindal*, speaking of the two Acts, observes, "if this is a general enactment, the subsequent declaration that an action of covenant may be commenced

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(a) 6 Law Rec. N. S. 222.

(b) 3 Ir. Eq. R. 70.

(c) 2 Mylne & C. 309.

(d) 2 Bingh. N. C. 679.

(e) 12 Adol. & E. 536.

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*Argument.*

during a longer period, is virtually an exception out of the former; we are to reconcile the two enactments if it be possible; but if it be not, the affirmative and negative cannot coexist, and the action of covenant must be taken as an exception." According to these authorities, if an action of covenant were brought, the amount of damages to be recovered would be twenty years' interest. Would it not be anomalous then to hold that by suing in one way, a party would be entitled to recover twenty years' arrears, while by proceeding in a different way he could only recover six? In *Henry v. Smith(a)*, your Lordship held that the same period of limitation applied to personal as to real estate. *O'Kelly v. Bodkin(b)*, is to the same effect. Following this principle out, here there is a covenant, upon which the party entitled can, in a personal action, recover twenty years' arrears of interest; why should he not have the same measure of relief in this Court? In *Harrison v. Duignan(c)*, your Lordship, it is true, gave only six years' arrears of interest, but it was for this reason, because the covenantor was not a party in the cause, and it did not appear but that there might be some good defence on his part to the recovery of more than six years' arrears. With respect to the fifty-third section of the 3 & 4 Vict. c. 105, it only applies to interest upon the debts specified in the early part of the section; it has no application to cases where interest was previously payable.

Feb. 14.

*Judgment.*

THE LORD CHANCELLOR:—

A very important point arises in this cause as to the operation of the Statute of Limitations. An estate is con-

(a) Vol. ii. pp. 381, 391.

(c) Vol. ii. p. 295.

(b) 3 Ir. Eq. R. 390, 410.

veyed by a father to his son, subject to a charge of 1100*l.* for the portions of the daughters of the grantor, and the grantee covenants with his father that he will pay the amount in the manner therein mentioned. It was first argued that there was a trust thereby created, and therefore that the case was not within the operation of the Statute: but there is no foundation for that argument. The estate was conveyed, no doubt, liable to that charge, but also subject to the payment of the head rent and renewal fines reserved in the several leases, under which the premises in question were held. There is, therefore, no more a trust created for the payment of this charge, than there is for the payment of the head rent and fines. There is, as I have already observed(*a*), an obligation imposed, but no trust created. I have, therefore, to consider the operation of the Statute, 3 & 4 Will. IV. c. 27, and the clause of the Statute 3 & 4 Vict. c. 105(*b*), as to the limitation of the right to bring actions upon specialties.

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By the fortieth section of the 3 & 4 Will. IV. c. 27, it was enacted, "that no action or suit shall be brought to recover any sum of money secured by any mortgage, &c., but within twenty years after a present right to recover the same." That section, therefore, provides that the principal shall not be recoverable after twenty years, except in the several cases enumerated therein; then follows the forty-second section, which embraces only the interest of the sums provided for in the fortieth section. If, therefore, the law rested upon that Act alone, it is plain that a distinct remedy was intended to be provided for these two sub-

(*a*) *Harrison v. Duignan*, *ante*, (b) Section 32.  
vol. ii. pp. 295, 304.

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jects; that is to say, that though the principal sum itself might be recoverable within twenty years, yet only six years' arrears of interest could be recovered upon that principal sum. Therefore, that which was supposed at the bar to have been so anomalous and inconsistent, was not so considered by the Legislature.

Then came the Statute 3 & 4 Will. IV. c. 42, only in force in England, but the third section of which has been recently introduced into this country by the 3 & 4 Vict. c. 105, and this confines the period of bringing an action for rent or on a specialty to twenty years. Now a great deal of the difficulty, which has arisen upon the construction of these Statutes in England, sprung from this circumstance, that the later Act, 3 & 4 Will. IV. c. 42, was not framed by the persons, who prepared the former Act. If the later Act had not passed, money secured on land, although also secured by bond or covenant, could not have been recovered after twenty years, nor could more than six years' arrear of interest have been recovered. The first Act provides for both cases. In *Doe v. Williams(a)*, Mr. Justice *Littledale* said, "The fortieth section relates to actions brought to recover the money, and those actions, in the case of mortgages, are either upon the covenant usually inserted in the mortgage deed, or on the bond, which commonly accompanies it." It never occurred to that very learned Judge, that the fortieth section did not apply to specialties. In *Paget v. Foley(b)*, the Court of Common Pleas held, that rent reserved upon an indenture of demise was not within the operation of 3 & 4 Will. IV. c. 27, but fell within the 3 & 4 Will. IV. c. 42. Mr. Justice *Bosanquet*,

(a) 5 Adol. & E. 291, 296.

(b) 2 Bingh. N. C. 679.

to some extent, differed from the rest of the Court ; he seemed to think that if the case had rested on the 3 & 4 Will. IV. c. 27, and that 3 & 4 Will. IV. c. 42, had never passed, the right to recover in that case would have been confined to six years, within the meaning of the 3 & 4 Will. IV. c. 27 ; but he agreed with the rest of the Court on the point, upon which they decided the case, that the 3 & 4 Will. IV. c. 27, was, in fact, removed or repealed by the 3 & 4 Will. IV. c. 42. It is a singular circumstance that the 3 & 4 Will. IV. c. 42, had, in fact, a prior operation to the 3 & 4 Will. IV. c. 27, although passed subsequently to it, and this Statute (3 & 4 Will. IV. c. 27), when it came into force, found the 3 & 4 Will. IV. c. 42, in full operation. In Ireland, however, the law stands on a different footing ; for the provision in the 3 & 4 Will. IV. c. 42, to which I have been adverting, was not introduced into this country, until it was embodied in the recent Statute of Victoria ; and it is to be regretted that it was thus introduced without some modification. The Statute of Victoria found the 3 & 4 Will. IV. c. 27, in full operation in this country. My clear opinion upon the effect of the 3 & 4 Will. IV. c. 27, is, that it expressly applies, in a case like the present, both to the principal and interest, although the money is also secured by bond or covenant.

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In *Strachan v. Thomas*(a) there was a little more difficulty than in *Paget v. Foley*. That was the case of an annuity, which fell directly within the terms of the 3 & 4 Will. IV. c. 27 ; for in the first section, which is the glossary of the Act, the word “rent” is defined to

(a) 12 Adol. & E. 536.

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extend to all annuities and periodical payments. The learned Chief Justice, however, in delivering judgment, merely said, "the present is not the usual case of reservation of rent upon a lease, and, so far, it is not properly an indenture of demise; it is a rent-charge, and, as such, falls within the forty-second section of the 3 & 4 Will. IV. c. 27: but notwithstanding that, we are of opinion that it falls within the third section of the 3 & 4 Will. IV. c. 42, as being an action of covenant on a specialty." Now this case went far beyond *Paget v. Foley*, which was held to fall within the provisions of the 3 & 4 Will. IV. c. 42; whereas, in the later case, the Court held that the case was within the 3 & 4 Will. IV. c. 27, and also within the 3 & 4 Will. IV. c. 42, by reason of the action being one upon a specialty. It appears to me that the two Statutes, being in *pari materia*, should be construed together, and, if possible, reconciled. There is this important distinction between the case which I have to consider, and both *Paget v. Foley* and *Strachan v. Thomas*; in both of those cases there was but one subject, the rent in the one, and the rent-charge in the other: it was therefore impossible to say that there could be a recovery of the same subject both within twenty years and within six years. But in the present case I have to deal with two subjects, the principal sum secured, which is clearly within the fortieth section of the 3 & 4 Will. IV. c. 27, and the interest upon that principal sum, which falls within the forty-second section.

It is singular that the Court of Exchequer in this country came to a different conclusion from the Court of Common Pleas in *Paget v. Foley*; for in *Bruen v. Nowlan*(a)

(a) 1 Jebb & S. 346, (n.)

they held that the 3 & 4 Will. IV. c. 27, did extend to rent reserved upon an indenture of demise. There was then no conflict of Statutes, for at that time there was no other Statute in force than the 3 & 4 Will. IV. c. 27: the Statute of Victoria had not passed, and the 3 & 4 Will. IV. c. 42, did not extend to this country. I think the Court of Exchequer decided in that case rightly, and it agrees with the opinion of Mr. Justice *Bosanquet*, to which I have already adverted. But the passing of the later Act opens to a different view.

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 ———  
*Judgment.*

In *Hodges v. The Croydon Canal Company(a)*, before the Master of the Rolls, the question raised was, whether a mortgagee could recover more than six years' arrear of interest: in the mortgage there was no covenant for payment of the principal or interest. Lord *Langdale* held that the case was within the 3 & 4 Will. IV. c. 27; that the principal might be recovered within twenty years, but that the remedy for arrears of interest was limited to six. He said, "in this case there is no covenant, or engagement to pay; there is simply a conveyance of the canal. Is this then the species of action of covenant or of debt upon bond or other specialty referred to in the second Act? I think not, and that this case depends on the first Act; and, consequently, no more than six years of interest can be recovered." It may be inferred, that if there had been a bond or covenant, the case would have been held to fall within the 3 & 4 Will. IV. c. 42; but that was not the point before the Court, and I only mention the case, that it may not be supposed to have been overlooked.

(a) 3 Beav. 86.



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*Judgment.*

In the argument before me, the fifty-third section of the Statute of Victoria was referred to, and it was insisted that that must be held to govern the present case: however I think that argument received a satisfactory answer from the counsel on the opposite side, that the proviso was not intended to apply to a case like the present.

The question then is, does this Act of Victoria, in the particular case of a charge, or a mortgage, with a covenant for payment, enlarge the remedy of the creditor as to interest? I am of opinion that it does not. I think the case falls within the 3 & 4 Will. IV. c. 27, and that the right to arrears of interest must be confined to six years. I do no violence to the Statute of Victoria by that construction. That Act was not intended to repeal the former one. There are many cases, in which the remedy provided by the Statute of Victoria may come into operation, without breaking in upon the former Statute. Both may, and ought to be construed together. The period of limitation is twenty years in each; and though there are savings in the one Act which are not to be found in the other, yet it does not appear to me, that these provisions prevent me from holding that this case falls, as to interest, within the 3 & 4 Will. IV. c. 27.

It is right to observe that the covenant in this case is not with the parties who are entitled to be paid, and this is important; for though the money might be recovered in an indirect course, yet the parties entitled could not support an action upon the covenant. I am of opinion that the claim here falls directly within the fortieth and forty-second sections of the 3 & 4 Will. IV. c. 27, which, in this respect, are not repealed by the thirty-second sec-

tion of the Statute of Victoria, and that the amount of arrears of interest to be recovered must be governed by the forty-second section. The exception must, therefore, be allowed(a).

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 HUGHES  
 v.  
 KELLY.  
 Judgment.

One of the Defendants in the suit having become insolvent, the Provisional Assignee was brought before the Court by supplemental bill.

Mr. *T. Rice Henn* applied for his costs, and submitted that they should be paid by the Plaintiff. He cited *Peake v. Gibbon(b)*, and *Boswell v. Tucker(c)*, and contended that the case of *Appleby v. Duke(d)* was directly opposed to all the former authorities.

The Lord Chancellor refused the costs, observing that he had always been of the opinion adopted in *Appleby v. Duke(e)*, and in many cases had strongly protested against the old rule.

(a) See *Du Vigier v. Lee*, 2 Hare, 326.

(b) 2 Russ. & M. 354.

(c) 1 Beav. 493.

(d) 1 Hare, 303.

(e) This case has been since affirmed, on appeal, by the Lord Chancellor, 1 Phillips, 272: see also *Clarke v. Wilmot*, 1 Phillips, 276.

1843.

*In Re* CHAMBERS.

Jan. 28.

Form of the order for the appointment of a new trustee, under the Statute 1 Will. IV. c. 60, in the room of a trustee, who was resident out of the jurisdiction, where the trust fund consisted merely of Government stock in the Bank of Ireland.

BY indenture of the 22nd of July, 1818, and made between *Jane Todd* of the first part, *Rebecca Todd* of the second part, *James Anderson* of the third part, and *James Chambers* (the petitioner) and *James Todd* of the fourth part, being the settlement executed on the marriage of *Jane Todd* and *James Anderson*, the sum of 2000*l.* Government stock was assigned unto the said *James Chambers* and *James Todd*, their executors, &c. upon trust, to permit the said *Jane Todd* to receive the interest thereof during her life, and in case there should be issue of the said marriage, upon certain trusts therein particularly mentioned.

In the year 1821 *James Todd* left Ireland for the purpose of going to America. In the month of June, 1822, a letter was received from him, dated from New Orleans, but since that time no account or intelligence whatsoever had been heard of him.

A petition was now presented on the part of *James Chambers*, stating the above matters, that the said *James Anderson* and *Jane* his wife were alive, and that there was issue of the marriage five children. That the trusts of the settlement were yet outstanding, and the fund was still invested in the names of *Chambers* and *Todd* in Government three-and-a-half per cent. stock: that there was no reason ever to expect the return of *Todd* to this country: and that all parties were anxious to have a new trustee appointed in the room of *Todd*, and the fund transferred into the names of *Chambers* and such new trustee.

The petition prayed that it might be referred to one of the Masters to inquire and report whether the said *James Todd* was living or dead; or whether he had left this country, and was now out of the jurisdiction, and whether it was uncertain that he would return: and if he was dead, or abroad, and that it was uncertain whether he would return, then that the said Master should approve of and appoint a fit and proper person as trustee in the place of said *James Todd*: and if it should appear necessary that a conveyance or assignment should be executed to such new trustee, then that the said Master should approve of a proper deed for the purpose, and the parties thereto, and that same should be executed accordingly: and that upon the appointment of such new trustee, the petitioner, and the Secretary, or Deputy Secretary, or Governor of the Bank of Ireland, should transfer said Government stock from the names of said *James Chambers* and *James Todd* to the names and credit of the petitioner and such new trustee as should be appointed: and that said stock, and the dividends or interest thereon, might be received and paid over pursuant to the trusts of said settlement: and also that the costs of such order and reference should be paid to the said petitioner out of the said Government stock, or the dividends thereon.

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In re  
CHAMBERS.  
Statement.

Mr. *Butt* moved the prayer of the petition.

The order drawn up was as follows:—

“Refer it to the Master to inquire and report whether *James Todd*, party to the indenture of marriage settlement bearing date the 22nd of July, 1818, in the petition mentioned, is possessed of the monies, funds, and pre-

Order.

1843.

*In re*  
CHAMBERS.*Order.*

mises in the petition mentioned, or of any, and what part or parts thereof, either alone, or jointly with any person, and whom, upon any and what trust or trusts, and for whom, within the intent and meaning of the Act of Parliament passed in the first year of His late Majesty King William IV. c. 60; and if so, let the Master inquire and report whether the said *James Todd* is out of the jurisdiction and not amenable to the process of this Court; and whether there is any, and what power in the said deed of settlement, to appoint new trustees: and in case the Master shall find that the said *James Todd* is out of the jurisdiction of this Court, and that there is no power in the said deed of settlement to appoint new trustees, let the said Master approve of a fit and proper person to be appointed a new trustee in the place and stead of the said *James Todd*: and let the said Master approve of some fit person to be appointed in the place of the said *James Todd*, to transfer and assign the several monies, funds, and premises, so as to vest the same in such new trustee, upon the trusts of the said deed of settlement: and reserve further order until the return of the Master's report: and let all parties interested have due notice of the proceedings under this order: but as regards the question of costs, same is hereby refused."

1843.

PEPPER v. BLOOMFIELD.

Feb. 10.

**THOMAS RYDER PEPPER**, by his last will and testament, of the 28th of May, 1827, devised and bequeathed as follows: "I give, devise, and bequeath, all my estates real, freehold, and personal, whether in possession, remainder, reversion, or expectancy, unto (trustees), to, for, and upon the several uses, trusts, intents, and purposes hereinafter mentioned; that is to say, in trust, in the first place, to pay my just debts and funeral expenses, and in the next place, to pay unto my dearly beloved wife, the said *Anne Pepper*, otherwise *Bloomfield*, 100*l.* And I further give unto to my said dearly beloved wife, 100*l.* to be paid her as soon as possible (out of my personal property) after my decease, in addition to her jointure, or any thing I have hereafter bequeathed her." The testator then, after directing the sale of a certain estate, and that the produce should become part of the fund for discharging his debts and legacies, proceeded thus: "I desire that the said *Benjamin Lord Bloomfield*, or *John Arthur Douglas Bloomfield*, shall have a legacy of 2000*l.* out of the residue of my property, if so much should remain after paying the other legacies, which I have hereby bequeathed, and after giving out of such residue 2000*l.* to my cousin and executor, *Charles Dean Oliver*, or if the full sum of 2000*l.* should not so remain, that the said *Benjamin Lord Bloomfield*, or the

Attestator, upon his marriage, covenanted to settle certain property, so as to secure a jointure of 400*l.* per annum for his wife. This covenant the testator never performed, but he directed the trustees of his will to pay the interest of 5000*l.* to his wife for her life, in addition to the provisions made for her by the marriage articles, and that 1000*l.* of said sum should be paid to such person as his said wife should by deed or will direct. There were several other legacies bequeathed by the testator. The 1000*l.* was paid to the widow during her life, but no portion of the interest, which accrued upon the balance of 4000*l.*, in consequence of the widow's claim,

under the covenant in the marriage articles, having exhausted the whole fund properly applicable for that purpose. Upon the widow's death, her personal representative claimed the arrears of interest out of the corpus of the fund, which was insufficient to pay all the legacies bequeathed by the testator:—*Held*, upon the true construction of the will, that the interest was given to the wife in priority to the other legacies, and that her personal representative was entitled to be paid the arrears of interest.

The interest was directed to be calculated at five per cent. according to the rule of the Court, the testator not having fixed any rate of interest.

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 —  
*Statement.*

said *John Arthur Douglas Bloomfield*, shall have so much as may remain, or be the residue of my said estate.

The testator then bequeathed in these words: " My will is that the residue of my said fortune, real, freehold, and personal, after payment of my debts, and funeral expenses, and of the aforesaid 200*l.* to my said wife, shall be disposed of as follows, that is to say, I will and desire, that my said trustees, or the survivor of them, or the executors, &c. of such survivor, shall and do pay and apply the interest of 5000*l.* to my said dear wife, during her natural life, and I desire that such provision should be in addition to the provision made for my said wife by articles entered into, previous to our intermarriage; that 1000*l.* of said sum of 5000*l.* shall be paid to such person as my said wife shall by any deed, to be by her executed, or by her last will and testament in writing, direct or appoint, and that the remainder of the said sum of 5000*l.* shall be paid to my executors for the uses and purposes of this my will: and as to all the rest and residue of the fortune to which I am, or shall be entitled, under the will of the said *John Ryder*, as well as under and by virtue of articles entered into on the intermarriage of my father and mother<sup>(a)</sup>, I give to the said General *Benjamin Lord Bloomfield*, two choice horses I shall die possessed of; and one horse, whichever shall be best suited, I give and bequeath to my dear *Harriett Bloomfield*, wife of the said General Lord *Bloomfield*, as a small token of my love for her. I give and bequeath to *William Wells*, my steward, if he shall be in my service at the time of my decease, the sum of 100*l.*, to be paid to him in six months after my decease, over and above all wages that shall be

(a) So in brief.

due to him, if so much should be and remain, after payment of the other legacies hereinbefore bequeathed. I also give and bequeath to *Thomas Ryan*, my herdsman, if he shall be so living with me at the time of my decease, two cows or heifers, to be chosen by my executors. I give and bequeath unto said *Charles Oliver*, son of my aunt *Oliver*, the sum of 500*l.*, and unto *Jane Roberts* otherwise *Garvey*, *Catharine Pepper*, otherwise *Joyce*, *Maunsell Pepper*, *Theobald Pepper*, *John Pepper*, *Thomas Pepper*, Junior, and *Hampden Pepper*, sons of my uncle, *Simon Pepper*, a like sum of 500*l.* a piece. And if it shall appear that the property, which I shall die possessed of, or shall be entitled to after the decease of Mrs. *James Jones*, should not be found to be sufficient to pay and discharge the different legacies I have given, I do hereby desire, that in case of such deficiency, that a rateable deduction shall be made from each of the legacies left in money, so that they may come within the scope of the property which I shall leave. And it is my will that none of the legacies bequeathed to the following persons, that is to say, *Catharine Pepper*, otherwise *Joyce*, *John Pepper*, *Maunsell Pepper*, *Theobald Pepper*, *Thomas Pepper*, Junior, *Hampden Pepper*, or *Charles Pepper*, shall be paid and payable till one year after the decease of the said Mrs. *Ryder*, otherwise *Jones*, widow of the said *John Ryder*, unless it shall be found by my executors that there are ample funds for doing so after payment of my just debts, funeral expenses, and the jointure and legacies payable to my said dear wife. And my further will is, that if any of the sons of said *Simon Pepper* shall die before their respectively attaining their ages of twenty-one years, or days of marriage, that then such child's portion of 500*l.* shall go, share and share alike, among the survivors of those who are, to have the like sum. I give and

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bequeath to Miss *Harriett Bloomfield* and Miss *Georgia Bloomfield*, daughters of said General *Benjamin Lord Bloomfield*, the sum of 1000*l.* sterling, each, payable, and to be paid, in like manner as the above legacies, in one year after the decease of Mrs. *James Jones* ; and as to all the rest and residue of my real, freehold, and personal estate and fortune, not hereinbefore by me given or devised, I give, devise, and bequeath the same unto my said cousin, *Charles Dean Oliver*, his heirs, executors, administrators, and assigns for ever. I desire that my said trustees, and the survivor of them, his executors, administrators, and assigns, shall and may, for the purposes of this my will, put out, and continue at interest, without risk or loss to themselves, my personal property."

It appeared that the testator, who was entitled to certain legacies under the will of his uncle, the Rev. *John Ryder*, and was also the residuary legatee therein named, had, upon the occasion of his marriage, in 1792, covenanted to settle a certain portion of the property which he was to derive under his uncle's will, so as to secure a jointure of 400*l.* per annum for his intended wife, and portions for the younger children of the marriage, and in default of children, for himself absolutely. This covenant, however, the testator neglected to fulfil, although it appeared that he had acquired considerable property under his uncle's will.

The testator departed this life in the year 1828, and the original bill was filed shortly afterwards by *Anne Pepper*, the widow of the testator, for a general administration of the real and personal estate of the testator. On the 9th of July, 1830, a decretal order was pronounced, referring it to the Master to take the usual accounts.

Various proceedings were had in the cause, to which it not necessary here particularly to advert: and in the year 1841, the Plaintiff, *Anne Pepper*, died, having, previous to her death, been paid a sum of 1000*l.*, part of the 5000*l.* bequeathed to her by the will of the testator, but not having received any portion of the interest, which accrued upon the residue of that sum.

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On the 12th of November, 1841, the cause was revived by the present Plaintiff, *William Wells*, one of the reported creditors, and also a legatee named in the will of the said testator; and on the 17th of January, 1842, an order of reference was pronounced at the Rolls, whereby it was referred to the Master to inquire and report the several sums remaining due under the decree in the first cause, for principal and interest, according to their respective priorities, if any; and also the funds in Bank applicable to pay the sums decreed, and allocate the same, as far as they would extend, in payment of the sums claimed, according to their respective priority, if any; and it was by the said order declared, that the said Master was not to consider himself bound by any finding as to the priority of the legatees, as mentioned in the reports filed respectively in the said first cause, the 13th of January, 1833, and the 16th of July, 1835.

On the 12th of December, 1842, the Master made his report, which contained the following finding: "And being contended before me, that the Defendant, *George Garvey*, as personal representative of *Anne Pepper*, late Plaintiff, was entitled to be paid the sum of 2238*l.* 9*s.* 2*d.* out of the said funds, for interest to the decease of the said *Anne Pepper*, on the sum of 4000*l.*, balance of the

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legacy of 5000*l.* bequeathed to her by the will of the said testator, *Thomas Ryder Pepper*, but as I am of opinion that the said *George Garvey* is not entitled to be paid the said sum of 2238*l.* 9*s.* 2*d.* out of the said funds, now standing to the credit of these causes, I have allocated the said funds amongst the several other parties and legatees of the said testator, and excluded the claim of the said *George Garvey*."

This finding was objected to on the part of *George Garvey*, who insisted that he, as the personal representative of the said *Anne Pepper*, was entitled to said sum of 2238*l.* 9*s.* 2*d.*, and that the Master ought to have allocated said sum to him in priority to the demands of the several parties and legatees in said report mentioned.

On the 17th of January, 1843, the case came on at the Rolls, upon a motion to vary the report in the above particular, upon which motion His Honor the Master of the Rolls was pleased to declare, that, according to the true construction of the will of *Thomas Ryder Pepper*, the said *George Garvey*, as the personal representative of *Anne Pepper*, deceased, was entitled to the sum of 2238*l.* 9*s.* 2*d.* out of the sum mentioned in the Master's report, for interest on the said sum of 4000*l.* in priority to the other legatees in the report mentioned; and to order that the Master should review his report, having regard to the said declaration.

An application was now made before the Lord Chancellor, on the part of *Thomas Pepper*, *John Pepper*, *Theobald Pepper*, and *Hampden Pepper*, four of the legatees named in the testator's will, that the order of the Master

of the Rolls might be discharged, so far as the same declared that, according to the true construction of the will of the testator, *Thomas Ryder Pepper*, the said *George Garvey*, as the personal representative of *Anne Pepper*, was entitled to the sum of 2238*l.* 9*s.* 2*d.* for interest on the said sum of 4000*l.*, in priority to the other legatees in said report mentioned, and directed the said report to be reviewed.

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Mr. *William Brooke* and Mr. *Molyneux*, in support of the appeal, cited *Acton v. Acton*(a), *The Marquis of Bute v. Cunynghame*(b), *Farmer v. Mills*(c), *Dimes v. Scott*(d), *Scott v. Salmond*(e), and *Arnold v. Arnold*(f).

Mr. Serjeant *Warren* and Mr. *Martley*, in support of the order, referred to *Brown v. Brown*(g).

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THE LORD CHANCELLOR :—

*Judgment.*

In this case there are two questions : first, whether the legacy of 5000*l.*, bequeathed to the testator's widow for her life, is entitled to any priority over the other legacies ; and if so, secondly, to what extent is that priority to be carried. The Master has postponed altogether the interest payable to the wife ; but his finding cannot, I think, be maintained. Whatever be the true construction of the will, it is clear that the testator intended to give priority, in a general sense, to this legacy.

(a) 1 Mer. 178.

(b) 2 Russ. 275.

(c) 4 Russ. 86.

(d) 4 Russ. 195.

(e) 1 Mylne & K. 363.

(f) 2 Mylne & K. 374.

(g) 1 Keen, 275.

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He begins his will by giving all his real and personal estate to his trustees and executors "for the purposes thereafter mentioned;" so that there is a general dedication of all his property to all the various purposes of his will. He first directs his debts to be paid; then he leaves a legacy of 100*l.* to his wife, and then another sum of 100*l.* "to be paid her as soon as possible (out of the sale of my personal property) after my decease, in addition to her jointure, or anything I have hereafter bequeathed her." When a testator speaks of a legacy as being in addition to one, which he had previously given to the same person, he must, generally speaking, be understood to mean, that such legacy is to partake of the same character as the former one. Then the testator brings in part of his real estate to swell the general assets, and he directs a legacy of 2000*l.* to be paid out of the residue to Lord Bloomfield, or *John A. D. Bloomfield*, if the state of the assets would permit of their being paid: so that the testator appears to have contemplated some priority between the different gifts in every part of this very complicated will: for he begins by giving a legacy to his wife, which he directs to be paid as soon as possible, and subsequently he gives legacies, which are only to be paid if there shall remain sufficient after payment of the other gifts.

Then comes the clause upon which the present question arises: "My will is, that the residue of my said fortune, real, freehold, and personal, after payment of my debts and funeral expenses, and of the aforesaid 200*l.* to my said wife, shall be disposed of as follows, that is to say, I will and desire that my said trustees shall and do pay the interest of 5000*l.* to my said dear wife during her life, and I desire that such provision should be in addition to the

provision made for my said wife, by articles entered into previous to our intermarriage; that 1000*l.* of the said sum of 5000*l.* shall be paid to such person as my said wife shall by deed or will direct, and that the remainder of the said sum of 5000*l.* shall be paid to my executors for the uses and purposes of this my will." This is a clear direction that the interest of the 5000*l.* should be paid to the wife, in addition to what he had before given. It therefore must, in some measure, partake of the character of the former gifts; and as the two legacies of 100*l.*, and the jointure were clearly prior to all the other gifts specified in the will, it follows, I think, that the gift of the interest should be entitled to a similar priority.

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Then comes this very inaccurate clause: "And as to all the rest and residue of the fortune to which I am or shall be entitled, under the will of the said *John Ryder*, as well as under and by virtue of articles entered into on the intermarriage of my father and mother, I give to the said General Lord *Bloomfield* two choice horses." The testator has here thought fit to recapitulate property, which was included in the previous devise. The gift of the horses shews, that this clause embraces something more than the property included in the settlement. Then there is the gift to *Wells*, which may be referred to as indicating his intention: "I give and bequeath to *W. Wells*, my steward, if he shall be in my service at the time of my decease, the sum of 100*l.*, to be paid him in six months after my decease, over and above all wages that shall be due to him, if so much shall remain after payment of the other legacies hereinbefore bequeathed." Now it is not contended that this legacy was not to be postponed to the legacies to the wife: for though it is to be paid within six months after

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his decease, yet it is postponed to the legacies "hereinbefore bequeathed." The testator then gives legacies to his eight cousins, of 500*l.* a-piece; and then follows this clause: "And if it shall appear that the property which I shall die possessed of, or shall be entitled to after the decease of *Mrs. James Jones*, should not be found to be sufficient to pay and discharge the different legacies I have given, I do hereby desire, in case of such deficiency, that a rateable deduction shall be made from each of the legacies left in money, so that they may come within the scope of the property, which I shall leave." Generally speaking, this would apply to all the legacies given before, but the subsequent words would seem to give the clause a different construction: "And it is my will that none of the legacies bequeathed to the following persons,"—enumerating seven of the eight to whom the legacies of 500*l.* a-piece had been already given,—"shall be paid and payable until one year after the decease of the said *Mrs. Ryder*, otherwise *Jones*, unless it shall be found by my executors that there are ample funds for doing so, after payment of my just debts, funeral expenses, and the jointure and legacies payable to my said dear wife." Now this would seem to put the legacies and the jointure to the wife upon the same footing as debts, and therefore that they were to be paid in priority to all other gifts. The testator expressly directs that seven of the eight legacies of 500*l.* each were not to be paid, if the payment of them at all interfered with the payment of the provision intended for his wife; and that would, at first sight, lead to the conclusion that the remaining one was to be paid at all events; but looking at the will more closely, it appears to me that such was not the testator's intention, and upon the whole will my opinion is, that the legacy of 5000*l.* is entitled to

priority. It is a mere question of intention, which the Court is not at liberty to presume, but which must be made out from something apparent upon the will itself, and which, I think, I do find in this will.

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But then a question of a very different nature arises: The interest was taken by the wife herself as a specialty creditor under the marriage settlement, her husband having neglected to perform his contract, and secure the jointure, which he had covenanted to do. The question now is, as the assets are insufficient, whether, on the one hand, the widow or her representative is not to get one shilling in respect of the arrears, as the Master has reported, or whether, according to the decision of His Honor, she is to be paid the whole of the arrears, and consequently entitled to come upon the *corpus* of the fund for those arrears? This is a question of very considerable difficulty: In the ordinary case of a bequest of a sum of money to the testator's wife for life, then after her death, to her child, if the fund proves deficient, whether there be or be not a question as to the priority of that legacy over others, the rights of the wife and child, as between themselves, would be settled according to the principles applicable to any other case of a settled fund proving deficient; the Court would put a value upon the life interest, or adopt some other means of ascertaining the loss; and in this case, if I could perceive an intention to give like successive interests, I should not confirm the order of His Honor. But the question is, is there not an intention apparent upon the will, that the tenant for life is to receive the full amount of the interest? The words are "I will and desire that my said trustees, &c. shall, and do pay, and apply the interest of 5000*l.* to my said dear wife during her natural life:" this



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is not a gift of the 5000*l.* in terms ; but a direction to the executors to pay the interest of a sum of that amount to the wife. It is not a gift of the 5000*l.* separate from the general personal estate ; and though 1000*l.* is given to the wife absolutely to dispose of, yet the remainder, which is not described as 4000*l.*, but as “the remainder of the said sum of 5000*l.*” is to be paid to his executors for the purposes of the will, which, among others, were the payment of the 500*l.* legacies. Now, these are the very legacies, over which I consider the legacy to the wife has priority. Those legatees are the very persons, with whom the question arises ; and I cannot hold that the wife is entitled to the interest on this sum in priority to any of the legacies in the will, and at the same time hold that those legacies are to be paid out of that sum, in preference to the arrears of interest due to the wife. If the principal sum be entitled to priority over the other legacies, how can I be called upon to deny that priority to the interest ? The true construction, I think, is, that the wife was to have, in priority, the interest of a principal sum of 5000*l.* which was to be invested, out of the general assets, in the Funds ; that she was to receive this interest during her life ; and that at her decease, the residue, after deducting 1000*l.*, over which she was to have a power of disposition, was to go to the executors for the purposes of the will. Upon the best consideration that I can give to this will, I think the Master of the Rolls has come to the right conclusion. I do not mean to represent the case as not being one of very considerable difficulty ; but I have not sufficient confidence in any other construction, to induce me to overrule His Honor’s decision.

There is some difficulty as to the rate of interest to be

given ; the common rate is five per cent., but as the assets are directed to be invested at interest, it might be said, that the rate of interest in the Funds should be given. The testator has not fixed any rate of interest ; I think it best, under all the circumstances, to follow the rule of the Court ; interest, therefore, is to be calculated at five per cent. All parties must have their costs, both here and at the Rolls, out of the fund, as the difficulty has been created by the testator himself.

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Affirm the Rolls' order, save as to the costs : let the costs of all parties of the motion at the Rolls, and of this motion, be paid out of the funds. Deposit to be returned to the Defendants, *Peppers* ; and let the Master, in reviewing his report of the 12th of December, 1842, pursuant to the order of the 17th of January, 1843, allow to the said *John Garvey*, interest at the rate of five per cent. per annum, on the said sum of 4000*l*.

*Reg. Lib.* 1842, fol. 171.

1843.

## ACHESON v. FAIR.

Feb. 11, 13.

A testator, seised of an estate *pur auter vie*, and possessed of personal property to the amount of about 4500*l.* by his will bequeathed "the sum of 1500*l.*, the other part of the 4500*l.*, together with any further property," in trust for the use of his father, to be disposed of by him, share and share alike, as he by deed or will should appoint, among testator's brothers, *H.* and *J.*, and the daughter or daughters of his sister *E.* The will contained a residuary clause in these words: "As to the rest, residue, and remainder of my worldly estate and fortune, not heretofore and hereby disposed of, in trust to the use of my affectionate father, *J. C.*, and his heirs, executors, and administrators for ever:—"

BY indenture, dated the 28th of November, 1789, *William P. K. Trench* demised to *John Cannon* the lands of *Gortnamacken*, containing 42 acres, to hold for two lives. *John Cannon* erected a flour mill on the lands, and shortly afterwards delivered up the possession of the premises to his son, *William Cannon*, the testator in the cause. *William* thenceforward carried on the business of the mill, and built a dwelling-house on the same lands.

By indenture, dated the 21st of September, 1811, being the settlement executed upon the occasion of the marriage of *William Cannon*, *John Cannon*, his father, conveyed to him absolutely the said lands and premises.

*William Cannon* duly made his will, dated the 16th of August, 1812, in the words following, viz.:—"I, *William Cannon*, of Millmount, give, devise, and bequeath all my worldly estate and fortune, of what nature or kind soever, I may die seised, possessed of, or otherwise entitled unto, real, personal, or otherwise, to the Honourable Captain *William L. Trench*, of Galway, *Henry Cannon*, of Corker, *Samuel Evans*, of Mount Evans, Esq., and to their heirs, executors, and administrators, in trust, nevertheless, to and

*Held*, that the estate *pur auter vie* passed under the residuary clause, and not under the words "any further property," upon the construction of the whole will.

*E.* had several daughters:—*Held*, that the testator's father took a life interest in the "1500*l.*, together with any further property," and that on his decease, without having executed his power of appointment, *H. J.*, and each of the daughters of *E.*, were entitled to equal shares.

A testator seised under a lease *pur auter vie*, devised the lease upon certain trusts: upon the determination of the lease, the trustee of the will obtained a new lease, which comprised the premises in the original lease, together with additional lands:—*Held*, that the trusts of the will did not attach upon the additional lands.

for the following uses, intents, and purposes, and none other, that is to say, that my said trustees shall and will, as speedily as may be after my decease, lay out in government or on private securities, but not to be answerable for the same, the sum of 4500*l.* to be raised out of my personal fortune, which fund stands charged with the payment of a jointure to my beloved wife, under and by virtue of my marriage settlement; and then as to the said 4500*l.*, and all my estate and interest in the farms of Raheen and Gortnamacken, otherwise Millmount, together with the dwelling-house, out-offices, mill-kilns, and all other edifices thereon, and their appurtenances, in trust for the use of the child, of which my beloved wife is now pregnant, if said child shall happen to be a son, and to his heirs, executors, and administrators, on his attaining the age of twenty-one years; but should my said son marry without the consent of my said trustees, or the survivor of them, before he attains the age of twenty-one years, then my will is that he shall receive no part of my estate or property hereby devised or bequeathed him, until he attains the age of twenty-five years; and I hereby empower my said trustees, or the survivor of them, to advance such reasonable portion or part of the said principal sum of 4500*l.* as they may think necessary for carrying on the mill business at Gortnamacken, otherwise Millmount, to my said son, on his attaining the age of eighteen years, and for his clothing, maintenance, and education, to advance the sum of 30*l.* a-year, till he attains the age of ten years: and from that period, and for the aforesaid purposes, till he attains the age of twenty-one years, to increase the same to 60*l.* a-year; and I desire that he may be educated at some good mercantile school. And I further hereby empower my said trustees to execute to my beloved and respected

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father a lease of the said farms, mill, and dwelling-house and offices of Raheen and Millmount, during the minority of my son, till he attains the age of eighteen years, and actually carries on the milling business at Gortnamacken, otherwise Millmount, the rent thereof to be rated by the said trustees much below its value ; but should it so happen that my said son should die before he attains his age of twenty-one years, or die without issue living at the time of his death, then as to the farms and mills of Gortnamacken and Raheen, together with their appurtenances, and also as to the said sum of 4500*l.*, then in further trust (chargeable however with a jointure for such wife as my said son may take, as aforesaid, which jointure is not to exceed the yearly amount of 100*l.*), to the use of my father during the term of his natural life ; and from and immediately after his decease, then in further trust to the use of my brothers, *Henry* and *John Cannon*, and the children or child of *Samuel Evans*, by my sister, *Esther Evans*, otherwise *Cannon*, share and share alike, as his last will and testament shall direct and appoint ; the same to be distributed among them ; and my will is that the rents, issues, and profits of my said farms and lands of Raheen and Gortnamacken shall be placed out as the said sum of 4500*l.* is hereinbefore directed, and in the like manner ; and when, by the accumulation of interest of the said sum of 4500*l.*, and the rents, issues, and profits of the said farms, there shall be any surplus created, then in further trust, as to the said surplus over and above the said sum of 4500*l.*, and also as to the interest in said farms, to the use of my father, for and during his natural life, and from and immediately after his decease, to the use of my brothers *Henry* and *John Cannon*, and the children or child of *Samuel Evans*, share and share alike ; my father's last will and

testament to direct and appoint the same to be distributed amongst them, it being my will and express desire and intent, that the child of which my wife is now pregnant, if a son, shall, even in the event of his having issue, and that they shall be living one or more at the time of his death, take no more of my worldly estate than the sum of 4500*l.*, clear and above all deductions whatsoever: and should it so happen that the child of which my wife is now pregnant should be a daughter, then my will is, that my said trustees shall, out of the said sum of 4500*l.*, pay her the sum of 3000*l.* on her day of marriage, the consent and approbation of my said trustees being thereunto first in writing had; and I hereby direct, and my will is, that should my said daughter marry without their consent, that from the day of such marriage she shall receive no more than the interest of the said sum of 3000*l.*, her receipt alone to be taken for the same notwithstanding, and the principal sum to go and be divided amongst her children, or, if but one child, the whole to that one child. And as to the sum of 1500*l.*, the other part of 4500*l.*, together with any further property, then in trust to the use of my father, to be disposed of by him, share and share alike, as he by will or deed may appoint, among my brothers *Henry* and *John Cannon*, and the daughter or daughters of *Samuel Evans*, by my sister, *Esther Evans*, with a like power, with like uses, to my said father, as to the said sum of 3000*l.* Should it so happen that my said daughter should die without issue living at the time of her death, for the maintenance and education of my said daughter, I desire that 30*l.* a-year may be paid, till she attains the age of ten years; and from that period that it may be increased to 60*l.* a-year, till her age of twenty-one years. As to the rest, residue, and remainder of my worldly

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estate and fortune not heretofore and hereby disposed of, in trust to the use of my affectionate father, *John Cannon*, and his heirs, executors, and administrators for ever; but if it so happens that my wife should be pregnant of two children, then in trust that the said sum of 4500*l.* shall be equally divided amongst them, share and share alike, in the same manner, and to the same uses as the said sums of 4500*l.* and the 3000*l.* are hereinbefore limited and directed.

“I also will and desire that my beloved wife’s jointure shall be paid her quarterly or half-yearly, as she may wish; and at the end of twelve months after my decease, she or her trustees may be at liberty to draw out of my personal property the sum of 1000*l.*, being the fortune I received with her, and which will be in full of all jointure. And I constitute and appoint the Honourable Captain *William Le Poer Trench*, of Galway, *Henry Cannon*, of Corker, *Samuel Evans*, of Mount Evans, to be my executors to see this my last will and testament executed to its intents and meaning: and in case of any difference arising between them, or any branch of my family, or my heirs, or them, to be left to the decision of *Robert O’Hara*, of Raheen, Esq. sen., and *Robert P. Perse*, of Castleboy, Esq.: their opinion and decision shall be final and conclusive: and should any of the parties concerned endeavour to break through or invalidate their decision, I order that he shall forfeit the whole of the sum or property he endeavours to dispute. And in case of the decease of the above-named referees, viz., *Robert O’Hara* and *Robert P. Perse*, Esqrs., I will and desire that my executors may appoint one or more in their place as arbitrators. And on the determination of the lease of Millmount, otherwise Gortnamacken, on which

I have expended about 3000*l.*, I beg and request my executors to get a renewal of said lease for the benefit of my heirs."

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On the same day on which this will bore date, *William Cannon* departed this life ; *Henry Cannon* alone proved the will. The child, of whom the testator's wife was *enceinte* at the time of making his will, was born in the following September, and proved to be a daughter, who was named *Deborah*, and afterwards married *Edward Maunsell*, and was the testator's only child.

At the time of the testator's death, he was seised of the said lands of Gortnamacken or Millmount, by virtue of the before mentioned instruments ; he was also possessed of personal property amounting to about 4500*l.*

On his death, *John Cannon* possessed himself of the personal property, and without the dissent of *Henry Cannon*, the executor, took upon himself to administer the assets ; he also went into possession of the lands and mill of Gortnamacken, in which he continued until 1824, when *Henry* took possession of them.

*John Cannon* paid certain debts of the testator ; he also paid the 1000*l.* directed by the will to be given to the testator's widow, in lieu of jointure, and the daughter's portion of 3000*l.* ; and on the marriage of *Thomas Fair* with *Mary Anne*, one of the daughters of *Samuel Evans*, *John Cannon* advanced to them a sum of 400*l.*, of which the sum of 369*l.* 4*s.* 7½*d.* was taken out of the testator's assets.

In 1826, *Henry Cannon* applied to Lord *Clancarty*, the



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head landlord, for a new lease of the lands of Gortnamacken, which was promised, on the terms of certain improvements, which were accordingly made by *Henry Cannon*, at a considerable expenditure; and by indenture dated the 27th of December, 1826, upon the expiration of the lease of 1789, Lord *Clancarty* made a lease to *Henry Cannon* of 152 acres, which included the 42 acres comprised in the former lease, at a rent of 60*l.* 10*s.* 10*d.*

*Henry Cannon* continued in possession of the lands to the time of his decease, which took place on the 27th of May, 1829; *John Fair* was his executor. Since the death of *Henry Cannon*, his widow had been in continued possession of the premises. *John Cannon* died on the 26th of April, 1828, having previously made his will; but did not in any manner exercise the power of appointment given to him by his son, the testator. *Deborah Evans*, another of the daughters of *Samuel Evans*, married *George Acheson*, and the present suit was instituted by them for the purpose of carrying into execution the trusts of the said will of *William Cannon*, and of ascertaining the rights of the devisees and legatees claiming under its provisions.

The usual reference was made to the Master, who by his report found, amongst other matters, the several facts and deeds above stated, and submitted for the decision of the Court the following special points, viz. :—

First,—Whether the lands of Gortnamacken were included in the gift, “together with any further property,” or whether *John Cannon* became absolutely entitled to them under the residuary clause.

Secondly,—Whether under the clause of the will, “ And as to the sum of 1500*l.*, the other part of the 4500*l.*, together,” &c. &c., *John Cannon* took any interest in the property therein comprised.

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Thirdly,—Whether the appointees named in the same clause were to take in equal shares, or whether the children of *Samuel Evans* were to take only one share amongst them.

Fourthly,—Whether after the 1000*l.* given to the testator’s widow had been deducted from the 4500*l.*, the amount of his personal property, the interest of the residue, and the rents of the lands, were to accumulate until such accumulated sum should amount to 4500*l.*, or whether the residue, 3500*l.*, without accumulation, was alone to be subject to the claims of the legatees.

The Master, by his report, also found that the lease of 27th of December, 1826, was a graft upon that of 1789, so far as regarded the lands comprised in that lease, but not farther, and that the persons interested in the old lease, under the will of *William Cannon*, were entitled to the benefit thereof, subject to the claims of the representatives of *Henry Cannon*, upon account of his expenditure on the premises, which was the consideration given for the lease obtained by him. The Master also reported that the sum of 400*l.*, paid by *John Cannon* to *Mary Ann Fair*, was a gratuity.

To this report several exceptions were taken : one, that the lease of 1826 should have been reported to have been a graft upon that of 1789, as to all the lands comprised in the later lease ; and another exception was grounded on

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the proposition, that the sum of 369*l.* 4*s.* 7½*d.*, part of the 400*l.*, should not have been reported a gratuity, but should have been considered as paid in part satisfaction of the claims of *Mary Anne Fair*, under the will of *William Cannon*.

The case now came on to be heard upon the Master's report, and exceptions.

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*Argument.* Mr. Serjeant Warren, Mr. Wm. Brooke, and Mr. B. C. Lloyd for the Plaintiffs.

Mr. Moore and Mr. J. G. Holmes for the personal representatives of *John Cannon* the elder.

Mr. Monahan and Mr. Flood, for parties claiming under *Henry Cannon*.

Mr. P. J. Blake for Mrs. Fair.

The following cases were cited : *Arnold v. Arnold*(a), *Saumarez v. Saumarez*(b), *Doe v. Rout*(c), *Doe v. Lainchbury*(d), *Doe v. Langlands*(e), *Chave v. Farrant*(f), *Randall v. Russell*(g), *Blakeney v. Blakeney*(h), and *James v. Dean*(k).

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*Judgment.* THE LORD CHANCELLOR :—

This is a very complicated will ; but although it is impossible to say, with certainty, that any sensible disposi-

(a) 2 Mylne & C. 256.

(b) 4 Mylne & C. 331.

(c) 7 Taunt. 79.

(d) 11 East, 290.

(e) 14 East, 370.

(f) 18 Ves. 8.

(g) 3 Mer. 190.

(h) 6 Sim. 52.

(i) 15 Ves. 236.

was in the mind of the testator, I do not think there is much real difficulty as to the construction which this Court must adopt.

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The testator had personal estate, which he considered sufficient to produce the sum of £4500. His wife was pregnant, and he intended to provide for three events. First, in case there should be one child, and that child a son, the 4500*l.* was to go to him on his attaining the age of twenty-one years, and certain portions of the interest were to be advanced during his minority: and there is a clear gift to that child of the leasehold premises. I was a little surprised to hear the case argued by one counsel, as if the words giving the estate were only used in order to secure the sum of 4500*l.*; and by another, as if there was an independent gift to the testator's father for life, with remainder to collateral relations, taking away the leaseholds altogether from the son; and Mr. *Lloyd* contended, I think, for a third construction. If the only child was a daughter, she was to have 3000*l.* upon her marriage; and it is clear that she was not to take any of the real estate. The testator directs, that if there should happen to be two children, although both sons, they should have 4500*l.*; and there are no words in the will to give to them any portion of the real estate: and yet the real estate is given to the only son, in the event of there only being one child. I cannot consider the clause which gives the father the surplus above 4500*l.*, and the interest in the farms, as an independent devise. The clause must be construed with reference to the other parts of the will. Now the accumulations not required for the maintenance of the son were to go over to the father for life, and then to the collateral relatives. The gift to the father is very clear in

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its terms: "Should it so happen that my said son should die before he attains his age of twenty-one, or die without issue living at the time of his death, then as to the farms, &c., and also as to the said sum of 4500*l.* in further trust, chargeable, however, with a jointure, &c., to the use of my father during his life." He puts the case here of the death of the son under age, or without issue living at his decease, and in either event gives the property over to his father. He then provides for an only child, being a daughter. Then come the words, on which there has been so much comment. After giving his daughter 3000*l.*, but no interest in the real estate, he says, "as to the sum of 1500*l.*, the other part of the 4500*l.*, together with any further property." What do these words include? It is settled that the word "property" is one of the largest that can be used. In *Huxtep v. Brooman*(*a*), Lord *Thurlow* held a disposition of "all I am worth" sufficient to pass real as well as personal estate. The only question, therefore, is, in what sense the testator intended to use these words. He begins his will by bequeathing all his worldly estate and fortune, and plainly intends to include every thing in those words. When he makes his residuary disposition, the gift is in these terms, "as to the rest, residue, and remainder of my worldly estate and fortune," precisely the words with which he set out: they would therefore be held to have the same operation here as at the commencement of the will, subject of course to what had been intermediately disposed of. The same word "property" is also used in the direction, that the testator's wife should have 1000*l.*; but there the expression is

(*a*) 1 Bro. C. C. 437.

“ out of my personal property,” thus introducing the qualifying word “ personal.”

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Here then there is a residuary gift, which in its terms embraces both real and personal property. I admit the rule to be, that if, in a will, there is a clear and complete disposition of property, that disposition cannot be cut down merely because there is also a residuary clause in the will; but if there is a reasonable doubt as to the extent of the previous disposition, the residuary gift must be taken into consideration, and the subject of the doubt may be included in the residue. It is said that the real estate was intended to go to the collateral relations; but I am rather disposed to think that the place in which the words “ further property” stand, leads to the construction that the testator meant property of the same nature as the 1500*l.*, and there would be property of the same nature, viz., the accumulations, the saving of the interest of the 3000*l.* until his daughter’s marriage. My impression therefore is, that in order to give effect to the whole of this will, the words “ further property” must be considered as confined to personal estate. I do not find, out of the residuary clause, any disposition of the real estate, except in the event of an only child, a son. The residuary clause, being a limitation to the father, his heirs, executors, and administrators, is properly applicable to both real and personal estate. I shall therefore hold that the real estate was not disposed of in the previous part of the will, and that it passed to the father under the residuary gift. This makes the will consistent: for if there had been a son born and he had died, the father was to have had a

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life interest in the real estate; and in no other event do I find any disposition in favour of the father except under the clause as to the 1500*l*.

As to the special finding on that point, I am disposed at present to think, that if the residuary clause includes the real estate, the testator intended the property to go to the collateral relations at once, to the entire exclusion of the father.

As to the third special point, it is quite clear that all the objects of the clause take equal interests in the gift: there is no pretence for the construction, which limits the interest of the children of *Samuel Evans* to one-third. And the 1000*l*. for the wife of the testator must come out of the general personal estate.

Upon the question whether the lease of 1826 was a graft upon the old lease as to the additional lands demised by the new lease, a case, before Sir *William Grant*, of *Randall v. Russell*(*a*) was referred to; and in a subsequent case, *Hardman v. Johnson*, in the same volume(*b*), Sir *W. Grant* again decided that the purchase by the lessee of the reversion in fee was for his own benefit. I will not carry this doctrine beyond the limits, to which the authorities have already extended it. If a man, having a fiduciary character in respect of certain lands, obtain a new interest, that will be bound by the old trusts; but in this case I am asked to go much further, and to hold that what he takes besides the old interest, although in new

(*a*) 3 Mer. 190.

(*b*) Page 347.

lands, is bound by the trusts of this will, because the new lands are comprised in the same lease with the old lands. There is no such rule of Equity. Is there any equity to follow what a trustee obtains in a property not subject to the trust? If, indeed, trustees mix up property in an improper manner, so that the trust property cannot be distinguished from their own, they may suffer from the consequence of their conduct; but here I must take it for granted that the newly acquired lands can be severed from the others; they may be liable to indemnify the others from the increased rent; but to say that I am bound thus to follow the trustee through all the acts of his life, and that if he took different lands by a different lease from the same party, I am to hold that the old trusts attached upon them would be most unreasonable; I have no disposition to extend the doctrine, which has been carried quite far enough; this exception must, therefore, be overruled, with costs; I shall also overrule the second exception, with costs: no relationship has been made out to bring the case within the authorities upon satisfaction. I shall reserve the first point, and mention it again.

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THE LORD CHANCELLOR :

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It is impossible to reconcile all parts of this will; but I think that the real estate passed under the residuary devise. In every case in the will in which the real estate is mentioned, it is described with great particularity. It is not likely, therefore, that the testator intended to include it after the bequest of 1500*l.*, under the general words "any further property." The residuary words in the



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clause are comprehensive, giving all his worldly estate and fortune to his father, his heirs, executors, and administrators, and in the beginning of the will he gives to the trustees all his worldly estate and fortune, and he adds, "whether real, personal, or otherwise;" so that in his view these words included his real estate.

It was said at the conclusion of the argument, that if there were one son, and that son died without issue, it was intended that the father should take a life interest in the real estate, with remainder to the collateral relations, and that the same disposition was to be supposed to have been intended, as to such parts of the property as should be undisposed of, in the event of the child being a daughter. But the answer to this is, that in the second case the interest to be disposed of was to be absolute, and in possession; for as he only gave two-thirds to the daughter, he gave one-third away immediately on his decease, but in the other case the interest was to be taken on a contingency and in remainder. However, independently of this answer, I cannot act on the probability of intention of a testator, who gives the real estate very anxiously to the child, in case it should be a son; yet if there should be two children, though each or one might be a son, makes no disposition of the real estate in their favour. I think, therefore, the real estate passed under the residuary devise. The only question is, as to the extent of the gift of the 1500*l.*, and "any further property:" these last words would, I think, include accumulations of the interest of the 3000*l.*; at least they would include any other portions of the personal estate, besides the 4500*l.*, which had not been disposed of. There is, therefore, plenty of property for these words to operate on.

The next question is, whether the father takes any interest in the 1500*l.* ; I think he takes a life interest, for in the first bequest, the testator expressly gives the father a life estate, and in this clause (the words are very singular) he gives the property to the use of the father, "to be disposed of by him, share and share alike, as he by will or deed may appoint, among my brothers," &c. ; the gift to the children in default of appointment is only by implication. If a testator give an estate to a man to dispose of to others, and they would only take in default of appointment by implication, and there are words giving the estate to the donee of the power, it is a very fair implication to give him an estate for life ; I do not lay down the rule generally, I am not called upon to do so, as a life estate was previously given.

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I N D E X  
TO  
THE PRINCIPAL MATTERS  
CONTAINED IN THIS VOLUME.

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ABSOLUTE INTEREST.

1. A testatrix by her will devised Blackacre, to her nephew *F.* for life, with remainder to his first and other sons in tail male, remainder to *R.* and several other nephews successively for like estates; and she devised Whiteacre to *R.* for life, remainder to his first and other sons in tail male, with remainders over to *F.* and several other nephews in the same manner. Afterwards she made a codicil, and reciting the gifts to *F.* and *R.* and declaring her wish to give to *R.* the property there devised to *F.* and *vice versa*, she revoked the said gifts, and devised the provision by her will given *F.* to *R.*, his heirs, executors, administrators, and assigns, and in lieu thereof, devised to *F.* his heirs, executors, administrators, and assigns, the property she had by her will given to *R.*:—*Held*, that the limitations over

in the will to the other nephews of the testatrix were revoked, and that *R.* and *F.* respectively took absolute interests in their gifts.

*Murray v. Johnston.* 143

2. A testator devised lands, of which he was seised *pur auter vie*, to his nephew *J. C.*, for life, and then proceeded thus: “And from and after his decease, I give and devise the same unto the issue male and female of the said *J. C.* now begotten, or to be begotten, on the body of his present wife, to be divided between and amongst them, in such manner, shares, and proportions, as the said *J. C.* shall, by his last will, limit and appoint; subject, nevertheless, to the provisions hereinafter particularly mentioned, viz. that the said *J. C.*, his heirs, executors, administrators, and assigns, and the persons who shall become entitled thereto, under this my will, shall

and will pay the head-landlord's rent of the said lands, and shall and will, yearly and every year, during continuance of the lease, pay, or cause to be paid, to *S.*, his heirs or assigns, one yearly annuity or sum of 40*l.* *J. C.* did not duly exercise his power of appointment:—

*Held*, that *J. C.* took an estate for life only; and that his issue took absolute interests as tenants in common as purchasers; and that the words "issue male and female" meant sons and daughters, or the first line of issue. *Crozier v. Crozier.* 373

#### ABSOLUTE ORDER.

In 1828 a judgment was obtained against a trader upon a bond, and warrant of attorney collateral. On the 3rd of March, 1841, the judgment creditor having presented a petition for the appointment of a receiver, under the Stat. 5 & 6 Will. IV. c. 55, obtained a conditional order for the purpose, which was subsequently made absolute on the 23rd of April; and on the 17th of March, in the same year, the trader committed an act of bankruptcy, and on the 17th of May a commission issued, under which he was duly found a bankrupt. Upon motion by the assignee for the discharge of the receiver:—*Held*, upon appeal, confirming the order at the Rolls, that it was the absolute and not the conditional order that attached the rents; and that, con-

sequently, as the judgment creditor was not in the position of a creditor having "an execution executed," that the receiver should be discharged. *Burt v. Bernard.* 464

#### ACCOUNT.

1. A sale was had under a decree of a Court of Equity in 1808. In 1822 a suit was instituted to set same aside. In 1823 the principal defendant answered the bill, but no further proceedings were had in the cause until 1839, when the suit was revived. The purchase having been set aside, the account of the rents was directed only from the filing of the bill of revivor and supplement. *Thornhill v. Glover.* 195
2. A lease made to a person standing in the position of a guardian, and at the same time filling the characters of agent, receiver, and tenant, directed to be set aside upon the equity arising out of these relations, and upon the ground of public policy: and with costs, notwithstanding that a period of eleven years had elapsed after the granting of the lease before the institution of the suit. The account, however, was limited to the filing of the bill, by reason of the delay. *Mulhallen v. Marum.* 317
3. A lease for a term of ninety-nine years, made by a Corporation to one of their own body, at a gross undervalue, was set aside with costs. The lessee was ordered to account for the rents and profits since the date of the lease, 1830, and it was

referred to the Master to approve of a scheme for the application of the rents. *Attorney-General v. The Corporation of Cashel.* 294

#### ACQUIESCENCE.

The Court of Chancery will not, in the case of alleged acquiescence, act on light grounds against the legal rights of parties. There must be either fraud or such acquiescence as in the view of this Court would make it a fraud afterwards to insist upon the legal right. *Gerrard v. O'Reilly.* 414

#### ADMINISTRATOR.

See APPLICATION OF PURCHASE-MONEY.

#### COSTS.

#### INTERPLEADER.

#### ADVERSE POSSESSION.

1. In 1812, *W.* who was entitled to a mortgage executed in the year 1802, filed a bill against *V.*, the mortgagor, to foreclose and sell; the mortgagor not having appeared, a decree upon sequestration was obtained against him. In 1830, the mortgagee having in the meantime died, and the suit having been revived by his representatives, a receiver was appointed over a portion of the mortgaged premises, the residue being at the time in the possession of an earlier creditor. In the year 1833, and during the progress of the account in the Master's Office, the mortgagor

died intestate, and the suit was thereupon revived against his heir at law and personal representative. The heir at law appeared in the suit, but did not answer, and the report having been made up, in 1837 a decree for a sale was pronounced. On the investigation of the title it was discovered, that shortly before the filing of the bill in 1812, on the occasion of the marriage of *V.*, the mortgagor, the equity of redemption in the mortgaged premises had been put into settlement, and limited to the mortgagor for life, with remainder to trustees for a term of years, to secure a jointure for his intended wife, and portions for the younger children of the marriage, with remainder to his first and other sons in tail male. This settlement, however, was never registered. In the month of May, 1838, the Plaintiffs filed the present supplemental bill against the parties claiming under the settlement, seeking the benefit of the decree and the former proceedings. The widow and younger children having set up as their defence the Statute of Limitations (3 & 4 Will. IV. c. 27):—*Held*, that the possession of the mortgagor was not adverse to the mortgagee, when the Statute passed, the possession being partly in the Court and partly in the earlier incumbrancer; and that there was, therefore, nothing to take away from the mortgagee the benefit of the fifteenth section. *Wrixon v. Vize.* 104

2. The Court will compel a purchaser to take a title depending upon parol evidence of adverse possession, under the Statute of Limitations (3 & 4 Will. IV. c. 27).  
*Scott v. Nixon.* 388

## AGENT.

By a decree of this Court, the Defendant was ordered to pay certain costs to the Plaintiffs: these costs were afterwards received from the Defendant by the Plaintiffs' solicitor, under a power of attorney from his clients. The Defendant then appealed from the decree, which was thereupon reversed, and the bill was eventually dismissed with costs. It was admitted that the amount of costs paid by the Defendant to the Plaintiffs' solicitor was not paid over, but retained with the assent of the Plaintiffs, and applied in payment of the costs incurred in defence of the appeal, as well as of the other costs then due:—*Held*, that though there was no actual transfer of the money, yet that, in point of law, the payment to the principal was complete; and that the Defendant was therefore not entitled to an order upon the solicitor for the repayment of the amount of the costs. *Smith v. Clarke.* 344

*See* ACCOUNT.

PUBLIC POLICY.

## AGREEMENT.

On the marriage of *E.*, her grandmother, who was not under any legal

or moral obligation to provide for her, signed the following memorandum, which had been written by her agent, at her request, viz.—Lady *T.* has desired *C.* to notify, that “she intends leaving *E.* 2000*l.* to bear interest from her death, and to be secured by a bond. She has further desired *C.* to say, that this is the provision she intends making for *E.* on her intended marriage.” On the same day *C.*, the agent, wrote to the intended husband, *S.*, stating that Lady *T.* intended to give 2000*l.*, at her death, and a house at Cheltenham. Subsequently *C.* wrote to Lady *T.*, stating that *S.* wished to have the bond perfected, and also to have the house which Lady *T.* intended to give. This letter was read to Lady *T.* by *E.*, and she then desired *E.* to keep it, adding, that it related to the business with *S.* The intended marriage was shortly afterwards solemnized in the lifetime of the grandmother; who, however, had been for some time unable to attend to business, in consequence of indisposition, and who died without having executed either the bond for 2000*l.*, or a conveyance of the house at Cheltenham:—

*Held*, that the memorandum, letters, and subsequent marriage, constituted a sufficient agreement within the Statute of Frauds: binding upon the representatives of Lady *T.*, both as to the bond for 2000*l.*, and the house at Cheltenham.

Previously to the execution of the

memorandum, Lady *T.* had bequeathed the house to *C.* :—

*Quære* whether under the Statute of Wills (1 Vict. c. 26), the contract rendered *C.* a trustee, or whether he took as devisee, subject to the contract? *Saunders v. Cramer.* 87

#### AMENDMENT.

1. Where a Plaintiff, after having excepted to the answer of a Defendant, amended his bill, and then obtained an order at the Rolls for liberty to argue the exceptions, notwithstanding the amendments; the Court, on appeal, ordered the Plaintiff to pay the costs of the motion at the Rolls, and of the exceptions, and the Defendant to answer the amended bill, and so much of the original bill as remained unanswered, within six weeks. *Burroughs v. M'Ilveen.* 150
2. After a decree has been enrolled, the Court has no jurisdiction to correct a clerical error upon motion. *Mannix v. Drinan.* 275

#### ANNUITY.

1. The established rule of this Court (which, however, is only general, and not inflexible) is, that interest cannot be recovered upon the arrears of an annuity.

Interest will be given upon the arrears of an annuity, where the person bound to pay it has been a party to the deed, by which it was created, and his acts disclose a system of

gross misconduct and opposition to the Court, for the purpose of evading payment.

Mere legal delay is not a sufficient ground to induce the Court to give interest. Nor will a mere covenant to pay an annuity be sufficient to create an exception to the general rule.

But if there is a covenant to indemnify an annuitant against the effect of incumbrances, and the perception of the annuity has been prevented by the claims of incumbrancers, and especially if this has occurred in consequence of the acts of the covenantor, a case for damages under the covenant is clearly shewn, and this Court, in order to prevent circuity of action, obtains jurisdiction to give interest upon the arrears of the annuity. *Martyn v. Blake.* 125

2. *J. F.* being resident in Ireland, entered into a contract for the purchase of two annuities from *L.* and his wife, the Defendants, who were resident in England. The security for the payment of the annuities was a joint and several covenant on the part of the Defendants, and a joint warrant of attorney to confess judgment in the Court of Queen's Bench in Ireland, and a policy of insurance on the life of one of the Defendants at an office in London or Westminster. The only property pledged for the payment of the annuity was an annuity to which the wife was entitled for



her separate use, charged upon property situated in Ireland, and which she assigned to the Plaintiff, and appointed him her attorney, in relation thereto. It appeared that the deeds were prepared in Ireland, and on Irish stamps, and sent to England to the Defendants, where they were executed by them, and the consideration money was paid to the Defendants in England, but the deed was executed by the Plaintiff in Ireland:—*Held*, that the transaction was an English one, and the security, therefore, within the meaning of the Annuity Act, 53 Geo. III. c. 141, and, consequently, void for want of enrolment. *Ferguson v. Lomas*. 238

8. A grant of an annuity charged upon a benefice for the life of the incumbent, is not prohibited by the Statute law of Ireland; but is, on the contrary, valid and binding upon the grantor during his own incumbency.

The object of the Statute 10 & 11 Car. I. c. 3, was, to protect the successor, and not to impose any restraint upon the parson himself.

A judgment, as such, and until sequestration issued, does not give such a lien upon a benefice as will enable the judgment creditor to rank in priority over other debts; and therefore, in this case, where the judgment bore date in 1831, but the sequestration did not issue until 1841, the Plaintiff, whose deed of annuity was executed in 1835, was held entitled to priority over

the judgment creditor. *Wise v. Beresford*. 276

#### ANSWER.

See AMENDMENT.

#### EXCEPTIONS.

#### APPLICATION OF PURCHASE MONEY.

*A.* effected two policies of insurance upon his life, one in his own name for 425*l.*; and the others for 1700*l.* in the name of *J.*, and by a deed of the year 1808, he assigned these two policies to *J.* upon certain trusts, which were declared in a deed of the same date, and which latter was referred to in the deed of assignment: the trusts were, first to pay certain debts of *A.*, and to reimburse *J.* advances which he from time to time had made to *A.*, and subject thereto, to hold the residue to form a fund for the daughters of *A.*, in such shares as he should appoint.

Upon the death of *A.* the amount of the policies was claimed by the executor of *J.*, and at the same time notices were served upon the Company, by the administrators of *A.*, one of his daughters, and the husband of another daughter, cautioning the Company against paying over the amount of the policies to *L.*

*Held*, upon a bill of interpleader, thereupon filed by the Company, that as to the holding of 1700*l.*,

there was no case of interpleader established; for that although there was no declaration in the deed of 1808, that the receipt of the trustee should be a discharge, yet that the nature of the trusts of the deed was sufficient to absolve the Company from seeing to the performance of the trusts, or the application of the money. *Glynn v. Locke.* 13

#### APPOINTMENT.

*See* POWER.

#### ASSETS.

*See* BANKRUPT.  
MARSHALLING.

#### ASSIGNMENT.

*See* EXECUTOR.  
LEGACY.

#### BANKRUPT.

When there are two creditors, who have taken securities for their respective debts, and the security of the first creditor ranges over two funds, while the security of the second is confined to one of those funds; the Court will marshal the assets, so as to throw the person who has two funds liable to his demand, on that which is not liable to the debt of the second creditor.

The bankruptcy of the debtor will not prevent the application of the general rule, for the assignee stands

in the position of the bankrupt. *In re Cornwall.* 173

#### BEQUEST.

*See* ABSOLUTE INTEREST.  
LEGACY.  
WILL.

#### BILL.

1. A bill of foreclosure is not a suit in Equity for the recovery of the money charged upon the land, although it lead to that; but is in effect a suit to obtain the equity of redemption, which is, in the view of Equity, an actual estate. *Quære*, therefore, as to *Dearman v. Wyche* (9 Simons 570). *Wrixon v. Vize.* 104
2. A possessory bill ought to state that the Plaintiff has been in the actual, quiet, and peaceable possession of the premises in question for three years, at least, before the filing of the bill, saving the disturbances given by the Defendant: and if there has been a mixed possession, partly by the Plaintiff, and partly by the Defendant, so that it cannot be said that either of the parties had a triennial possession, this Court will not interfere, but will leave the parties to settle their rights at law. *Hemphill v. M'Kenna.* 183

*See* REDEMPTION.

#### BREACH OF TRUST.

*See* CORPORATION.  
TRUST.

## CHARGE.

*P.* by his will directed that his widow and second son, who were the devisees of his estates, should apply a sum not exceeding 400*l.* per annum, to the maintenance and care of his son *John*, who was a lunatic, and that whoever should at any time be in possession of his *L.* estate, should, during the life of his said son, apply said sum annually for his comfortable support, care, and maintenance; and that that said sum should be deemed, taken, and considered as a charge thereon. The *L.* estate was sold after the death of the testator, under a decree in a creditor's suit, and a sum of 10,550*l.* of the purchase money was invested in stock to the credit of the cause, to secure the payment of the lunatic's allowance, which, under an order of the Court, was fixed at 280*l.* per annum. At the death of the lunatic in 1842, the surplus of the dividends upon the stock amounted to 812*l.* 12*s.* 9*d.*; upon an application by the personal representative of the lunatic, claiming this sum as part of his personal estate, and a cross claim on part of the owners of the estate, claiming under the second son:—*Held*, that upon the true construction of the will, there was no greater charge upon the estate than what was actually required and applied for the maintenance and support of the lunatic; and that consequently, the sum in question did not form

any portion of the personal estate of the lunatic.

*Held* also, that even if it did, yet that as the savings of the lunatic's maintenance, it belonged to the parties claiming under the widow and second son, who were in the situation of committee of the person of the lunatic; and that in any view of the case, the personal representative of the lunatic had no claim upon it.

*Seemle*, the question had been already disposed of by the decree in the suit in 1837. *In re Ponsonby.* 27

*See* DEED.

INTEREST.

## CHARGE UPON BENEFICE.

A grant of an annuity charged upon a benefice for the life of the incumbent, is not prohibited by the Statute law of Ireland; but is, on the contrary, valid and binding upon the grantor during his own incumbency.

The object of the Statute 10 & 11 Car. I. c. 3, was, to protect the successor, and not to impose any restraint upon the parson himself.

A judgment as such, and until sequestration issued, does not give such a lien upon a benefice as will enable the judgment creditor to rank in priority over other debts; and, therefore, in this case, where the judgment bore date in 1831, but the sequestration did not issue

1841, the Plaintiff, whose of annuity was executed in , was held entitled to priority the judgment creditor. *Wise vresford.* 276

# CHARTER.

*See* CORPORATION.

EVIDENCE.

# CLERICAL ERROR.

a claim has been allowed, the t has no jurisdiction to correct rical error upon motion. *Man- r. Drinan.* 275

# CO-DEFENDANTS.

*See* DEFENDANT.

# COMMITTEE.

*See* LUNATIC.  
PETITION.

# CONDITIONAL ORDER.

*See* ABSOLUTE ORDER.  
EXECUTION.

# CONSOLIDATED SUM.

*See* DECREE.  
INTEREST.

# CORONER.

mer discharged from his office neglect of duty, by the autho- of the Great Seal. *Ex parte ey.* 34

# CORPORATION.

In 1230, *M.*, Archbishop of Cashel, with the consent of the Dean and Chapter, granted to the Corpora- tion of Cashel the town of Cashel; and also granted to the said Corpo- ration and their tenants, and all inhabitants of the said town, free pasture in all his lands, except meadows, &c. Subsequently the Corporation became seised in fee of the lands, over which free pasture had been so granted. There was not any evidence to shew the time, or the manner, in which the Cor- poration became seised of the soil : —*Held*, that inasmuch as the old right of pasturage in the lands of the Corporation was affected with a trust for the benefit of the inhabi- tants of Cashel, so the soil of the lands, which were substituted for that right, was bound by the same trust, and that whether the new right was acquired by usurpation or otherwise.

A lease for a term of ninety-nine years, made by the Corporation, to one of their own body, at a gross undervalue, was set aside with costs, the lessee was ordered to account for the rents and profits since the date of the lease, 1830, and it was referred to the Master to approve of a scheme for the application of the rents.

To prove the grant of 1230, by *M.*, an attested copy of an enrol- ment of a charter of confirmation by *Roland*, a subsequent Archbishop

of Cashel, found amongst the Parliamentary Rolls, in the Rolls' Office, and which contained an *inspeximus* of the charter of grant by *M.*, was admitted as good secondary evidence. *The Attorney-General v. The Corporation of Cashel.* 294

### COSTS.

1. *A.* effected two policies of insurance upon his life, one in his own name for 425*l.*; and the others for 1700*l.* in the name of *J.*, and by a deed of the year 1808, he assigned these two policies to *J.* upon certain trusts, which were declared in a deed of the same date, and which latter was referred to in the deed of assignment: The trusts were, first, to pay certain debts of *A.*, and to reimburse *J.* advances which he from time to time had made to *A.*, and subject thereto, to hold the residue to form a fund for the daughters of *A.*, in such shares as he should appoint.

Upon the death of *A.* the amount of the policies was claimed by the executor of *J.*, and at the same time notices were served upon the Company, by the administrators of *A.*, one of his daughters, and the husband of another daughter, cautioning the Company against paying over the amount of the policies to *L.*

*Held*, upon a bill of interpleader, thereupon filed by the Company, that

as to the holding of 1700*l.*, there was no case of interpleader established; for that, although there was no declaration in the deed of 1808, that the receipt of the trustee should be a discharge, yet that the nature of the trusts of the deed was sufficient to absolve the Company from seeing to the performance of the trusts, or the application of the money.

*Held*, also, with regard to the policy of 425*l.*, that the suit was maintainable, by reason of the claim of the administrator of *A.*, yet as it appeared, that within three days after the bill was filed, a second notice was served by the same party, withdrawing his demand, that the Plaintiff was not justified in persisting any further in the suit, and ought to have discontinued.

Disposition of the costs of the different parties. *Glynn v. Locke.*

13

2. Incumbrancers are entitled to their costs out of the fund according to their respective priorities, and not against the Plaintiff in the first instance. *Hall v. Hill.* 59
3. Where a Plaintiff, after having excepted to the answer of a Defendant, amended his bill, and then obtained an order at the Rolls for liberty to argue the exceptions, notwithstanding the amendments, the Court, on appeal, ordered the Plaintiff to pay the costs of the motion at the Rolls, and of the exceptions, and the defendant to answer the amended bill, and so much of the original

bill as remained unanswered, within six weeks. *Burroughs v. McIlween*.

150

4. The trustees in this case were allowed their costs out of the fund.

The Court refused to direct the costs of the relators to be taxed as between solicitor and client. *The Attorney-General v. Drummond*.

162

5. Bill by a *feme covert* and her infant children, the same person being the next friend of the married woman and the minors. The bill was filed in the vacation; and within the time prescribed by the General Rules, the Defendant filed a demurrer, and served a notice on the same day, apprizing the Plaintiffs, that the demurrer was filed without prejudice to the right of the Defendant to move to compel the Plaintiffs to give security for costs:—*Held*, that by the filing of the demurrer, the right to compel the Plaintiffs to give security for costs was not lost.

*Held* also, notwithstanding that the same person is next friend to the infants and the *feme covert*, that the Court will compel the Plaintiffs to give security for costs.

The form of the order in such a case is that the proceedings be stayed, until the next friend of the *feme covert* be changed, or security for costs be given. *Drinan v. Mannix*.

154

6. A bill of costs had been referred

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for taxation, and the parties agreed in the office upon the sum at which they were to be reported; subsequently the client having discovered certain entries' in his own handwriting, of advances made to the solicitor, and for which he had received no credit, applied that the costs should be sent back to the Master for taxation. The application was refused with costs. *Austin v. Chambers*.

178

7. A sale took place in 1808, under a decree of a Court of Equity. In 1822 a suit was instituted to impeach this sale. In 1823 the principal Defendant answered the bill. No further proceedings in the cause were had until 1839, when the suit was revived. The Plaintiff was held entitled to relief under the circumstances, but the costs were refused to both parties in consequence of the great delay. *Thornhill v. Glover*.

195

8. The general rule is, to make the party seeking a redemption pay the costs of the suit; but the Court has jurisdiction to throw the costs on the landlord, and the question depends on its own discretion. *Malone v. Geraghty*.

239

9. A decree must be made up before the cause can be reheard, and if a petition of rehearing is presented, while the decree remains in minutes, it will be dismissed with costs. *Ibid*.

250

10. A lease for a term of ninety-nine

years, made by a Corporation to one of their own body, at a gross under-value, was set aside with costs; the lessee was ordered to account for the rents and profits since the date of the lease, 1830, and it was referred to the Master to approve of a scheme for the application of the rents. *The Attorney-General v. the Corporation of Cashel.* 294

11. In this case an application was made on the part of persons representing the tenants, for a reference to the Master, to inquire and report as to the liability of a lunatic to renew the lease under which the premises were held. The application was granted, and the right of the parties seeking the renewal was established:—*Held*, nevertheless, that the costs of the petition, and all the proceedings thereunder, should be borne by the applicants. *In re Doolan.* 442

12. The provisional assignee of an insolvent debtor is not entitled to his costs against the Plaintiff. *Hughes v. Kelly.* 482

#### COVENANT.

1. Mere legal delay is not a sufficient ground to induce the Court to give interest. Nor will a mere covenant to pay an annuity be sufficient to create an exception to the general rule.

But if there is a covenant to indemnify an annuitant against the effect of incumbrances, and the perception of the annuity has been pre-

vented by the claims of incumbrancers, and especially if this has occurred in consequence of the acts of the covenantor, a case for damages under the covenant is clearly shewn, and this Court, in order to prevent circuity of action, obtains jurisdiction to give interest upon the arrears of the annuity. *Martyn v. Blake.* 125

2. A lessee covenanted, during the continuance of the demise, not to raise or extend a certain building, under the penalty of the yearly rent reserved in the lease, the same to be recovered by distress or otherwise, in the same manner as the said yearly rent:—*Held*, that this double rent was in the nature of liquidated damages for a breach of the covenant, and not a penalty, properly so called.

This Court will not, in case of alleged acquiescence, lightly act against the legal rights of parties; there must be either fraud or such acquiescence, as, in the view of this Court, would make it fraudulent afterwards to insist upon the legal right. *Gerrard v. O'Reilly.* 414

3. By deed executed in the year 1809 certain lands were conveyed, subject to the payment of a sum of money, which the grantee thereby covenanted to pay to third persons:—*Held*, that, notwithstanding the covenant, only six years' arrear of interest could be recovered. *Held*, also, that though by the

deed of 1809 there was an obligation imposed, yet there was not a trust created. *Hughes v. Kelly.* 482  
See RENEWAL.

### CREDITOR'S SUIT.

In a creditor's suit, this Court, upon motion, with the consent of all parties, directed an account of judgments affecting the lands to be sold, prior and contemporaneous with the filing of the bill. *Montgomery v. Southwell.* 171  
See COSTS.

LIMITATIONS, STATUTE OF.  
MORTGAGE.  
SALE, JUDICIAL.

### DAMAGES.

See COVENANT.

### DEBTOR AND CREDITOR.

See BANKRUPT.  
JUDGMENT.  
MARSHALLING.

### DECREE.

1. A decree must be made up before the cause can be re-heard; and if a petition of re-hearing is presented while the decree remains in minutes, it will be dismissed with costs. *Malone v. Geraghty.* 250
2. After a decree has been enrolled, the Court has no jurisdiction to correct a clerical error upon motion. *Mannix v. Drinan.* 275
3. A party seeking to have the bene-

fit of a former decree, must be prepared to shew that such decree is right; for the Court will not carry the decree, if it appear to be erroneous, into execution.

In this case a decree of 1814 declared the consolidated sum, for principal and interest, upon foot of a portion provided by settlement for younger children, to be wellcharged upon the lands in the decree mentioned, and directed the interest to be thenceforth calculated upon this consolidated sum. Upon a bill filed by the Plaintiff, in whom this charge had become vested, the Court refused to give him the benefit of the decree, unless he consented to waive his claim to interest on the consolidated sum. *O'Connell v. M'Namara.* 411

4. Hill filed by a mortgagee against the executors and persons claiming under the will of the mortgagor, who had thereby created a trust for the payment of the mortgage debt.

The decree directed that the personal estate of the testator should be first applied in the payment of his debts, and then declared that the Plaintiff should be entitled to the benefit of his mortgage security, in case such personal estate should prove insufficient; and that in case the premises comprised in the mortgage should prove insufficient, the Plaintiff should be considered as a specialty creditor for the residue of his demand, and entitled to the



- benefit of the trusts of the testator's will. *Marshall v. M'Aravey*. 232
5. Frame of decree in a suit for foreclosure and sale, where there are mortgages before the Court, *puisne* to that of the Plaintiff. *Davis v. Rowan*. 476
6. Forms of decrees. *The Attorney-General v. Drummond*. 162  
*Thornhill v. Glover*. 195  
 See AGENT.

## DEED.

1. The *habendum* of a lease was in these terms: "To have, &c., to *T. S.*, his heirs, &c., for and during the natural life and lives of *J. B.*, *W. B.*, and *E. B.*, or the longest liver of them, or whatever life or lives shall for ever or hereafter be nominated or appointed, added or inserted, on the back of this indenture, or a label affixed thereunto, paying for each and every life so renewed, a pepper-corn, if demanded, yielding, &c." The lease did not contain any technical covenant for renewal.  
*Semble*. The *habendum* amounted to a covenant for a perpetual renewal. *Sheppard v. Doolan*. 1
2. Upon an application to draw money out of Court, which has been the subject of settlement, the instrument itself must be produced in Court. *Batt v. Cuthbertson*. 58
3. Principles upon which the Court acts in suits to set aside deeds, on

the ground of the intoxication of the grantor. *Nagle v. Baylor*. 60

4. The Court has no jurisdiction to compel a male ward with whom a marriage has been solemnized without his consent, on attaining his full age, to execute a settlement of his estate, so as to exclude his wife from all participation in the property. *In re Murray*. 83

By a settlement of the 3rd of July, 1801, certain freehold lands were settled by *T. G.* on his eldest son, *J. G.*, and his issue, in strict settlement; with an ultimate remainder to "*H. G.* (the second son of the settlor), his heirs and assigns;" and by the same settlement certain other lands, which were partly freehold and partly chattel, were settled on *T. G.* for life; "and from and after the decease of the said *T. G.* to the several uses, intents, and purposes as are hereinbefore expressed and declared," respecting the first set of lands, and subject to which those lands were, in the previous part, limited to the issue of *J. G.*, "to and for the use and benefit of the said *H. G.*, subject to the provisions heretofore made for the issue of the said marriage:"—*Held*, that the second class of lands were settled to the same uses as were declared respecting the first, and that *H. G.* took an estate in both lands in fee. *Garde v. Garde*. 435

By indenture of settlement of the year

1808, and made on the marriage of *A.*, certain premises, which were chattel, were conveyed to trustees for the use of *A.* for life; and from and after his decease, subject to a jointure for his intended wife, to the use of the issue of the said marriage, and for want of such issue to the use of *A.* for ever: and a power was given to *A.* by the said deed "that he should be at liberty to raise by deed, mortgage, or by any other writing, a sum of 1000*l.*, to be applied to any purposes the said *A.* pleases, in case the said marriage shall take effect; but the said sum of 1000*l.* is not to be raised by way of the sale of said lands." *A.* having become indebted to *Q. H.* in the sum of 1500*l.*, assigned his life estate to the said *Q. H.*, by way of mortgage; and for the purpose of more effectually securing the payment of said sum of 1500*l.*, he, by virtue of the power in the said settlement, granted and appointed, by way of mortgage, the said sum of 1000*l.* In 1817, *A.* became bankrupt, and under an order made in the matter of the bankruptcy, all the estate and interest of the assignee, and also of *Q. H.*, were purchased by the Plaintiff, and assigned by deed of the 1st of October, 1818. *A.* subsequently died. On a bill filed by the Plaintiff to have the benefit of his purchase, it was held, on appeal to the House of Lords, that by virtue of this assignment, the Plaintiff be-

came entitled to this sum of 1000*l.*, in addition to the life estate of the bankrupt. The cause now coming on upon the report of the Master ascertaining the amount due to the Plaintiff for principal and interest:—*Held*, that the settlement of 1808, under which the right to charge the sum of 1000*l.* arose, authorized the creation of that charge with interest. *Simpson v. O'Sullivan.* 446

See ANNUITY.

INTEREST.

JUDGMENT.

PARTIES.

TRUST DEED.

#### DEFENDANT.

1. Where the Defendant does not appear at the hearing of the cause, the Plaintiff must make out his case, and establish his right to the decree which he asks for. *Hayes v. Brierly.* 274
2. Bill by a simple contract creditor against the widow (who was the personal representative), and the heir at law (who was a minor) of the deceased debtor. The personal representative having been examined in the cause on the part of the Plaintiff:—*Held*, that the Plaintiff might read her evidence at the hearing against the co-Defendant, the heir at law. *Lynch v. Joyce.* 349

See JUDGMENT.

PARTIES.

DEVISE.

*See* ABSOLUTE INTEREST.  
ESTATE FOR LIFE.  
INTEREST.  
LEGACY.  
WILL.

DOUBTFUL TITLE.

1. Where the purchaser of an interest sold under the decree of this Court, thereby acquires information as to a supposed defect in the title to that interest, and improperly avails himself of those means of information, by purchasing the estate of the person who alone could have taken advantage of the supposed defect; such purchaser will not be allowed the benefit of the general rule as to doubtful titles. *Sheppard v. Doolan.* 1
2. The Court will compel a purchaser to take a title depending upon parol evidence of adverse possession, under the Statute of Limitations, 3 & 4 Will. IV. c. 27. *Scott v. Nixon.* 388

ECCLESIASTICAL BENEFICE.

*See* CHARGE UPON BENEFICE.

ECCLESIASTICAL LAW.

Practice as to settling a case involving a question of ecclesiastical law. *Hogg v. Garrett.* 409

EJECTMENT.

1. Where a lease has been evicted for non-payment of rent, under the Ejectment Statutes in Ireland, and an equitable mortgagee of the tenant's interest filed a bill for redemption against the landlord:—*Held*, that he was entitled to redeem the premises evicted, under the earliest of those Statutes, the 11 Anne, c. 2.

The general rule is, to make the party seeking a redemption pay the costs of the suit; but the Court has jurisdiction to throw the costs on the landlord, and the question depends on its own discretion. *Malone v. Geraghty.* 239

2. This Court has an original jurisdiction for the relief of tenants, whose leases have been evicted for non-payment of rent; and this ancient jurisdiction has not been destroyed, but merely restricted, by the Irish Ejectment Statutes, which operate as a Statute of Limitations, and oblige the tenant, if he thinks fit to have recourse to a Court of Equity, to do so within the particular times specified in those Statutes.

The words of the fourth section of the 11 Anne, c. 2, cannot be limited to mean assignees at law, but must be held to include every interest under the lessee.

*Semble*, Where a bill for redemption is filed within the time prescribed by the Statute, by the parties who are entitled to redeem, the

Court has jurisdiction to allow the cause to stand over, in order that formal parties may be added. *Ibid.* 250

See COSTS.

DECREE.

### ENGLISH CONTRACT.

*J. F.* being resident in Ireland, entered into a contract for the purchase of two annuities from *L.* and his wife, the Defendants, who were resident in England. The security for the payment of the annuities was a joint and several covenant on the part of the Defendants, and a joint warrant of attorney to confess judgment in the Court of Queen's Bench in Ireland, and a policy of insurance on the life of one of the Defendants, at an office in London or Westminster. The only property pledged for the payment of the annuity was an annuity, to which the wife was entitled for her separate use, charged upon property situated in Ireland, and which she assigned to the Plaintiff, and appointed him her attorney, in relation thereto. It appeared that the deeds were prepared in Ireland, and on Irish stamps, and sent to England to the Defendants, where they were executed by them, and the consideration money was paid to the Defendants in England, but the deed was executed by the Plaintiff in Ireland:—*Held*, that the transaction was an English one, and the

security, therefore, within the meaning of the Annuity Act, 53 Geo. III. c. 141, and, consequently, void for want of enrolment. *Ferguson v. Lomax.* 238

### ENROLMENT.

See ANNUITY.

DECREE.

### EQUITABLE JURISDICTION.

See DEED.

EJECTMENT.

PUBLIC POLICY.

REDEMPTION.

WARD.

### EQUITABLE MORTGAGEE.

1. *Seemle*, if a vendor, who has a right, upon equitable grounds, to impeach the sale, not only neglects to do so, but by the subsequent execution of other deeds, adopts the sale, and acts upon it as binding, he cannot afterwards impeach the title of equitable mortgagees, who, subsequently to this Act, advanced their money *bonâ fide* and without notice, to the purchaser. *Nagle v. Baylor.* 60
2. Where a lease had been evicted for non-payment of rent, under the Ejectment Statutes in Ireland, and an equitable mortgagee of the tenant's interest filed a bill for redemption against the landlord:—*Held*, that he was entitled, under the earliest of those Statutes, the 11 Anne, c. 2, to redeem the pre-

mises evicted. *Malone v. Geraghty*.  
239

#### ESTATE FOR LIFE.

1. The purchaser of an estate *pur auter vie*, sold under a decree of the Court of Chancery:—*Held*, not entitled to be discharged from his purchase, in a case in which the sole *cestui que vie* died, subsequently to the bidding, and before the Master's report could have been confirmed according to the practice of the Court. *Vesey v. Elwood*. 74
2. Where a life estate was sold under a decree, and the tenant for life died, and subsequently to the lodgment of one-fourth of the purchase-money, and the obtaining of the rule *nisi*, but prior to the confirmation of the sale:—*Held*, that the contract was not complete, until the sale was confirmed by the order of the Court, and that the purchaser was not bound to complete his purchase. *Vincent v. Going*. 75 (n.)
3. A testator devised lands, of which he was seised *pur auter vie*, to his nephew, *J. C.*, for life, and then proceeded thus: "And from and after his decease, I give and devise the same unto the issue male and female of the said *J. C.* now begotten, or to be begotten, on the body of his present wife, to be divided between and amongst them in such manner, shares, and proportions, as the said *J. C.* shall, by his last will, limit and appoint; subject, nevertheless, to the provisions hereinaf-

ter particularly mentioned, viz., that the said *J. C.*, his heirs, executors, administrators, and assigns, and the persons, who shall become entitled thereto, under this my will, shall and will pay the head landlord's rent of the said lands, and shall and will, yearly and every year, during the continuance of the lease, pay, or cause to be paid, to *S.*, his heirs, or assigns, one yearly annuity or sum of £40, &c." *J. C.* did not duly exercise his power of appointment:—

*Held*, that *J. C.* took an estate for life only; and that his issue took absolute interests as tenants in common as purchasers; and that the words "issue male and female" meant sons and daughters, or the first line of issue. *Crozier v. Crozier*. 373

*See* ABSOLUTE INTEREST.  
ISSUE.

#### EVIDENCE.

1. In 1230, *M.*, Archbishop of Cashel, with the consent of the Dean and Chapter, granted to the Corporation of Cashel, the town of Cashel; and also granted to the said Corporation and their tenants, and all inhabitants of the said town, free pasture in all his lands, except meadows, &c. Subsequently the Corporation became seised in fee of the soil of the lands, over which free pasture had been so granted. There was not evidence to shew the time or

the manner, in which the Corporation became seised of the soil :—*Held*, that inasmuch as the old right of pasturage in the lands of the Corporation was affected with a trust for the benefit of the inhabitants of Cashel, so the soil of the lands, which were substituted for that right, was bound by the same trust, and that whether the new right was acquired by usurpation or otherwise.

To prove the grant of 1230, by *M.*, an attested copy of an enrolment of a charter of confirmation by *Roland*, a subsequent Archbishop of Cashel, found amongst the Parliamentary Rolls, in the Rolls' Office, and which contained an *inspeximus* of the charter of grant by *M.*, was admitted as good secondary evidence. *The Attorney-General v. the Corporation of Cashel.* 294

2. Bill by a simple contract creditor against the widow (who was the personal representative), and the heir at law (who was a minor) of the deceased debtor. The personal representative having been examined in the cause on the part of the Plaintiff:—*Held*, that the Plaintiff might read her evidence at the hearing against the co-Defendant, the heir at law. *Lynch v. Joyce.*

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#### EXCEPTIONS.

Where a Plaintiff, after having excepted to the answer of a Defendant,

amended his bill, and then obtained an order at the Rolls for liability to argue the exceptions, notwithstanding the amendments. The Court, on appeal, ordered the Plaintiff to pay the costs of the motion at the Rolls, and of the exceptions, and the Defendant to answer the amended bill, and so much of the original bill as remained unanswered, within six weeks. *Burroughs v. McIlween.*

150

#### EXCESSIVE EXECUTION.

*See POWER.*

#### EXECUTION EXECUTED.

In 1828 a judgment was obtained against a trader upon a bond, and warrant of attorney collateral. On the 3rd of March, 1841, the judgment creditor having presented a petition for the appointment of a receiver, under the Statute 5 & 6 William IV. c. 55, obtained a conditional order for the purpose, which was subsequently made absolute on the 23rd of April. On the 17th of March, in the same year, the trader committed an act of bankruptcy, and on the 17th of May a commission issued, under which he was duly found a bankrupt. Upon motion of the assignee, for the discharge of the receiver :—*Held*, upon appeal, confirming the order at the Rolls, that it was the absolute and not the conditional order that attached the

rents; and that, consequently, as the judgment creditor was not in the position of a creditor having "an execution executed," that the receivers should be discharged. *Burt v. Bernard.* 464

#### EXECUTOR.

*See* LEGACY.

PERSONAL REPRESENTATIVE.  
RELEASE.

#### FEME COVERT.

Bill by a *feme covert* and her infant children, the same person being the next friend of the married woman and the minors. The bill was filed in the vacation; and within the time prescribed by the General Rules, the Defendant filed a demurrer, and served a notice on the same day, apprising the Plaintiffs that the demurrer was filed without prejudice to the right of the Defendant to move to compel the Plaintiffs to give security for costs:—*Held*, that by the filing of the demurrer, the right to compel the Plaintiffs to give security for costs was not lost.

*Held* also, notwithstanding that the same person is next friend to the infants and the *feme covert*, that the Court will compel the Plaintiffs to give security for costs.

The form of the order in such a case is, that the proceedings be stayed, until the next friend of the *feme covert* be changed, or the se-

curity for costs be given. *Drinan v. Mannix.* 154

*See* COSTS.

#### FINES.

*See* RENEWAL FINES.

#### FORECLOSURE.

*See* DECREE.

MORTGAGE.

#### FOREIGN CONTRACT.

*See* ANNUITY.

ENGLISH CONTRACT.

#### FORFEITURE.

*See* EJECTMENT.

REDEMPTION.

#### FRAUDS, STATUTE OF.

*See* AGREEMENT.

#### FURTHER DIRECTIONS.

*Seem*, it is not the rule of this Court, that an estate cannot be directed to be sold, until the cause comes back for further directions. *Lynch v. Joyce.* 349

#### GENERAL ORDER.

*See* p. 182.

#### GRAFT.

A testator seised under a lease *pur auter vie*, devised the lease upon certain trusts; upon the determi-

nation of the lease, the trustee of the will obtained a new lease, which comprised the premises in the original lease, together with additional lands :—*Held*, that the trusts of the will did not attach upon the additional lands. *Acheson v. Fair*. 512

#### GREAT SEAL.

A coroner discharged from his office for neglect of duty by the authority of the Great Seal. *Ex parte Pasley*. 34

#### GUARDIAN.

*See* PUBLIC POLICY.

#### HEARING.

When the Defendant does not appear at the hearing of the cause, the Plaintiff must make out his case and establish his right to the decree which he asks for. *Hayes v. Briorley*. 274

#### HEIR AT LAW.

*See* EVIDENCE.

#### HUSBAND AND WIFE.

*See* COSTS.

FEME COVERT.

#### INFANT.

There is no saving of minority given in the fifteenth section of the Statute of Limitations, 3 & 4 Will. IV.

c. 27, and, therefore, the period of five years, given by the section, cannot be extended by reason of the infancy of the claimant. *Scott v. Nixon*. 389

*See* EVIDENCE.

FEME COVERT.

#### INJUNCTION.

1. When a plaintiff comes for an *ex parte* injunction, he must state his case in the first instance fully and fairly. *Hemphill v. M'Kenna*. 3
2. This Court will not, in case of alleged acquiescence, act on light grounds against the legal right of parties ; there must be either fraud or such acquiescence as, in the view of this Court, would make it a fraud afterwards to insist upon the legal right. *Gerrard v. O'Reilly*. 414

#### INSURANCE.

*A.* effected two policies of insurance upon his life, one in his own name for 425*l.*, and the other for 1700*l.*, in the name of *J.* In the year 1808, he assigned, by deed, these two policies to *J.* upon certain trusts, which were declared in a second deed of the same date, and which was referred to in the deed of assignment : these trusts were, first to pay certain debts of *A.*, and to reimburse *J.* advances which he from time to time had made to *A.*, and subject thereto, to hold the residue to form



a fund for the daughters of *A.*, in such shares as he should appoint.

Upon the death of *A.* the amount of the policies was claimed by the executor of *J.*, and at the same time notices were served upon the Company, by the administrator of *A.*, by one of his daughters, and by the husband of another daughter, cautioning the Company against paying over the amount of the policies to *L.* :—

*Held*, upon a bill of interpleader, thereupon filed by the Company, that as to the policy of 1700*l.*, there was no case of interpleader established; for that although there was no declaration in the deed of 1808, that the receipt of the trustees should be a discharge, yet that the nature of the trusts of the deed was sufficient to absolve the Company from seeing to the performance of the trusts, or the application of the money.

*Held*, also, that with regard to the policy of 425*l.*, the suit was maintainable, by reason of the claim of the administrator of *A.*; but, that as it appeared, that within a few days after the bill was filed, a second notice was served by the same party, withdrawing his demand, the Plaintiff was not justified in persisting any further in the suit, and ought to have discontinued.

Disposition of the costs of the different parties. *Glynn v. Locke.*

11

See BANKRUPT.  
MARSHALLING.

## INTEREST.

1. The established rule of this Court (which, however, is only general, and not inflexible) is, that interest cannot be recovered upon the arrears of an annuity.

Interest will be given upon the arrears of an annuity, where the person bound to pay it has been a party to the deed, by which it was created, and his acts disclose a system of gross misconduct and opposition to the Court for the purpose of evading payment.

Mere legal delay is not a sufficient ground to induce the Court to give interest; nor will a mere covenant to pay an annuity be sufficient to create an exception to the general rule.

But if there is a covenant to indemnify an annuitant against the effect of incumbrances, and the perception of the annuity has been prevented by the claims of incumbrancers, and especially if this has occurred in consequence of the acts of the covenantor, a case for damages under the covenant is clearly shewn, and this Court, in order to prevent circuitry of action, obtains jurisdiction to give interest upon the arrears of the annuity. *Martyn v. Blake.* 125

2. By a decree of 1814, it was declared, that the consolidated sum for principal and interest, upon foot of a portion provided by settlement for younger children, was well charged upon the lands in the decree men-

tioned: and the said decree directed the interest to be thenceforth calculated upon this consolidated sum; upon a bill filed by the said Plaintiff, in whom the charge had become vested, the Court refused to give him the benefit of the decree, unless he consented to waive his claim to interest on the consolidated sum. *O'Connell v. M'Namara.* 411

3. By indenture of settlement of the year 1808, and made on the marriage of *A.*, certain premises, which were chattel, were conveyed to trustees for the use of *A.* for life; and from and after his decease, subject to a jointure for his intended wife, to the use of the issue of the said marriage, and for want of such issue to the use of *A.* for ever: and a power was given to *A.* by the said deed, "that he should be at liberty to raise by deed, mortgage, or by any other writing, a sum of 1000*l.*, to be applied to any purposes the said *A.* pleases, in case the said marriage shall take effect; but the said sum of 1000*l.* is not to be raised by way of the sale of said lands." *A.* having become indebted to *Q. H.* in the sum of 1500*l.*, assigned his life estate to the said *Q. H.*, by way of mortgage; and for the purpose of more effectually securing the payment of said sum of 1500*l.*, he, by virtue of the power in the said settlement, granted and appointed, by way of mortgage, the

said sum of 1000*l.* In 1817, *A.* became bankrupt, and under an order made in the matter of the bankruptcy, all the estate and interest of the assignee, and also of *Q. H.*, were purchased by the Plaintiff, and assigned by deed of the 1st of October, 1818. *A.* subsequently died. On a bill filed by the Plaintiff to have the benefit of his purchase, it was held, on appeal to the House of Lords, that by virtue of this assignment, the Plaintiff became entitled to this sum of 1000*l.*, in addition to the life estate of the bankrupt. The cause now coming on upon the report of the Master, ascertaining the amount due to the Plaintiff for principal and interest:—*Held*, that the settlement of 1808, under which the right to charge the sum of 1000*l.* arose, authorized the creation of that charge with interest. *Simpson v. O'Sullivan.* 446

4. By deed executed in the year 1809, certain lands were conveyed, subject to the payment of a sum of money, which the grantee thereby covenanted with the grantor to pay to third persons:—*Held*, that, notwithstanding the covenant, only six years' arrears of interest could be recovered. *Hughes v. Kelly.* 482
5. A testator, upon his marriage, covenanted to settle certain property, so as to secure a jointure of 400*l.* per annum for his wife. This covenant the testator never performed, but he directed the trustees of his will to

pay the interest of 5000*l.* to his wife for her life, in addition to the provisions made for her by the marriage articles, and that 1000*l.* of said sum should be paid to such person as his said wife should by deed or will direct. There were several other legacies bequeathed by the testator. The 1000*l.* was paid to the widow during her life, but no portion of the interest which accrued upon the balance of 4000*l.* in consequence of the widow's claim, under the covenant in the marriage articles, having exhausted the whole fund properly applicable for that purpose. Upon the widow's death, her personal representative claimed the arrears of interest out of the *corpus* of the fund, which was insufficient to pay all the legacies bequeathed by the testator:—*Held*, upon the true construction of the will, that the interest was given to the wife in priority to the other legacies, and that her personal representative was entitled to be paid the arrears of interest.

The interest was directed to be calculated at five per cent. according to the rule of the Court, the testator not having fixed any rate of interest. *Pepper v. Bloomfield*.

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#### INTERPLEADER.

*A.* effected two policies of insurance upon his life, one in his own name for 425*l.*; and the other for 1700*l.* in the name of *J.* In the year

1808, he assigned by deed these two policies to *J.* upon certain trusts, which were declared in a second deed of the same date, and which was referred to in the deed of assignment: These trusts were, first, to pay certain debts of *A.*, then to reimburse *J.* advances which he from time to time had made to *A.*, and subject thereto to hold the residue to form a fund for the daughters of *A.*, in such shares as he should appoint.

Upon the death of *A.* the amount of the policies was claimed by *L.*, the executor of *J.*, and at the same time notices were served upon the Company, by the administrator of *A.*, by two of his sons, by one of his daughters, and by the husband of another daughter, cautioning the Company against paying over the amount of the policies to *L.*:—

*Held*, upon a bill of interpleader, thereupon filed by the Company, that as to the policy of 1700*l.*, there was no case of interpleader established; for that although there was no declaration in the deed of 1808, that the receipt of the trustee should be a discharge, yet that the nature of the trusts of the deed was sufficient to absolve the Company from seeing to the performance of the trusts, or the application of the money.

*Held*, also, that with regard to the policy of 425*l.*, the suit was maintainable, by reason of the claim of the administrator of *A.*; but that

as it appeared, that within a few days after the bill was filed, a second notice was served by the same party, withdrawing his demand, the Plaintiff was not justified in persisting any further in the suit, and ought to have discontinued.

Disposition of the costs of the different parties. *Glynn v. Locke.*

11

*See* COSTS.

### INTOXICATION.

Principles upon which the Court acts in suits to set aside deeds, on the ground of the intoxication of the grantor. *Nagle v. Baylor.* 60

*See* DEED.

### ISSUE.

1. A testator devised lands, of which he was seised *pur auter vie*, to his nephew, *J. C.*, for life, and then proceeded thus:—"and from and after his decease, I give and devise the same unto the issue, male and female, of the said *J. C.*, now begotten, or to be begotten on the body of his present wife, to be divided between and amongst them in such manner, shares, and proportions as the said *J. C.* shall by his last will limit and appoint, subject, nevertheless, to the provisions hereinafter particularly mentioned, viz., that the said *J. C.*, his heirs, executors, administrators, and assigns, and the persons, who shall

become entitled thereto, under this my will, shall and will pay the head landlord's rent of the said lands, and shall and will yearly and every year, during the continuance of the lease, pay or cause to be paid to *S.*, his heirs or assigns, one yearly annuity or sum of 40*l.*," &c. *J. C.* did not duly exercise his power of appointment:—

*Held*, that *J. C.* took an estate for life only: and that his issue took absolute interests as tenants in common as purchasers, and that the words "issue male and female," meant sons and daughters, or the first line of issue. *Crozier v. Crozier.* 373

### JUDGMENT.

Creditors by judgment and recognizance, although scheduled to a trust deed, executed for their payment, are within the General Order of the 22nd June, 1842, when a suit is instituted in this Court for carrying into execution the terms of such deed by sale. *Harvey v. Lawlor.*

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2. In a creditor's suit, this Court, upon motion, with the consent of all parties, directed an account of judgments, affecting the lands to be sold, prior and contemporaneous with the filing of the bill. *Montgomery v. Southwell.* 171

3. A judgment, as such, and until sequestration issued, does not give such a lien upon a benefice as will

enable the judgment creditor to rank in priority over other debts; and therefore, in this case, where the judgment bore date in 1831, but the sequestration did not issue until 1841, the Plaintiff, whose deed of annuity was executed in 1835, was held entitled to priority over the judgment creditor. *Wise v. Beresford.* 276

### JURISDICTION.

*See* CORONER.

DEED.

EJECTMENT.

GREAT SEAL.

REDEMPTION.

RENEWAL FINES.

### LACHES.

1. Sale in 1808. The present suit was instituted in 1822, and in 1823, the principal Defendant answered the bill. No further proceedings in the cause were had until 1839, when the suit was revived:—*Held*, that as the circumstances were such, that the purchase could not be sustained, the Plaintiff was entitled to relief, notwithstanding the lapse of time. But costs were refused to both parties in consequence of the great delay; and an account of the rents was directed only from the filing of the bill of revivor and supplement. *Thornhill v. Glover.* 196

2. A lease made to a person standing in the position of guardian, and at

the same time filling the characters of agent, receiver, and tenant, directed to be set aside upon the equity arising out of these relations, and upon the ground of public policy, and with costs, notwithstanding that a period of eleven years had elapsed after the granting of the lease before the institution of the suit. But the account was limited to the filing of the bill, by reason of the delay. *Mulhallen v. Marum.* 317

### LANDLORD.

*See* COSTS.

EJECTMENT.

POSSESSORY BILL.

REDEMPTION.

### LEASE.

*See* CORPORATION.

COVENANT.

DEED.

LACHES.

PUBLIC POLICY.

### LEGACY.

A testator, upon his marriage, covenanted to settle certain property, so as to secure a jointure of 4000*l.* per annum for his wife. This covenant the testator never performed; but he directed the trustees of his will to pay the interest of 5000*l.* to his wife for her life, in addition to the provisions made for her by the marriage articles, and that 1000*l.* of

said sum should be paid to such person as his said wife should by deed or will direct. There were several other legacies bequeathed by the testator. The 1000*l.* was paid to the widow during her life, but no portion of the interest which accrued upon the balance of 4000*l.*, in consequence of the widow's claim, under the covenant in the marriage articles, having exhausted the whole fund properly applicable for that purpose. Upon the widow's death, her personal representative claimed the arrears of interest out of the corpus of the fund, which was insufficient to pay all the legacies bequeathed by the testator:—*Held*, upon the true construction of the will, that the interest was given to the wife in priority to the other legacies, and that her personal representative was entitled to be paid the arrears of interest. *Pepper v. Bloomfield.* 499

2. A testator seized of an estate *pur auter vie*, and possessed of personal property to the amount of about 4500*l.*, by his will bequeathed "the sum of 1500*l.*, the other part of the 4500*l.* together with any further property," in trust for the use of his father, to be disposed of by him, share and share alike, as he by deed or will should appoint, among testator's brothers, *H.* and *J.*, and the daughter or daughters of his sister *E.* The will contained a residuary clause in these words: "as to the rest, residue, and remain-

der of my worldly estate and fortune, not heretofore and hereby disposed of, in trust, to the use of my affectionate father, *J. C.*, and his heirs, executors, and administrators for ever:"—*Held*, that the estate, *pur auter vie*, passed under the residuary clause, and not under the words "any further property," upon the true construction of the whole will. *Acheson v. Fair.* 512

## LETTERS.

*See* AGREEMENT.

FRAUDS, STATUTE OF.

## LIFE ESTATE.

A testator seized of an estate *pur auter vie*, and possessed of personal property to the amount of about 4500*l.*, by his will bequeathed "the sum of 1500*l.*, the other part of the 4500*l.* together with any further property," in trust, for the use of his father, to be disposed of by him, share and share alike, as he by deed or will should appoint, among testator's brothers *H.* and *J.* and the daughter or daughters of his sister *E.* *E.* had several daughters:—*Held*, that the testator's father took a "life interest in the 1500*l.*, together with any further property," and that on his decease, without having executed his power of appointment, *H. J.*, and each of the daughters of *E.*, were entitled to equal shares. *Acheson v. Fair.* 512

*See* ESTATE FOR LIFE.

SALE, JUDICIAL.

## LIMITATION, STATUTES OF.

1. In 1812, *W.*, who was entitled to a mortgage executed in the year 1802, filed a bill against *V.*, the mortgagor to foreclose and sell; the mortgagor, not having appeared, a decree upon sequestration was obtained against him. In 1830, the mortgagee having in the meantime died, and the suit having been revived by his representatives, a receiver was appointed over a portion of the mortgaged premises, the residue being at the time in the possession of an earlier creditor. In the year 1833, and during the progress of the account in the Master's Office, the mortgagor died intestate, and the suit was thereupon revived against his heir at law and personal representative. The heir at law appeared in the suit, but did not answer, and the report having been made up, in 1837 a decree for a sale was pronounced. On the investigation of the title it was discovered, that shortly before the filing of the bill in 1812, on the occasion of the marriage of *V.*, the mortgagor, the equity of redemption in the mortgaged premises had been put into settlement, and limited to the mortgagor for life, with remainder to trustees for a term of years, to secure a jointure for his intended wife, and portions for the younger children of the marriage, with remainder to his first and other sons in tail male. This settlement, however, was never registered. In

the month of May, 1838, the Plaintiffs filed the present supplemental bill against the parties claiming under the settlement, seeking the benefit of the decree and the former proceedings. The widow and younger children having set up as their defence, the Statute of Limitations (3 & 4 Will. IV. c. 27):—

*Held*, that the possession of the mortgagor was not adverse to the mortgagee, when the Statute passed, the possession being partly in the Court and partly in the earlier incumbrancer; and that there was, therefore, nothing to take away from the mortgagee the benefit of the fifteenth section.

A bill of foreclosure is not a suit in Equity for the recovery of the money charged upon the land, although it may lead to that; but it is, in effect, a suit to obtain the equity of redemption, which is, in the view of Equity, an actual estate: *Quære*, therefore, as to *Dearman v. Wyche* (9 Simons, 570).

The right to file a bill of foreclosure, whether the mortgage be legal or equitable, falls within the twenty-fourth section of the 3 & 4 Will. IV. c. 27, and the 7 Will. IV. & 1 Vict. c. 28; and the time is governed by the legal right of the party to bring an action, or if he have not the legal estate, by the right which he would have had, if his estate had been a legal instead of an equitable one.

Though the appointment of a re-

ceiver does not prevent the bar of the Statute<sup>a</sup> from operating against stranger, yet it will serve to prevent, at least in this Court, time from running in favour of a stranger to the suit.

A suit in a Court of Equity, properly instituted, will prevent time from running; and a Court of Law ought to act upon this principle, the same rule being prescribed by the Statute for both Courts. This Court, however, will protect its own jurisdiction, and will not permit a suitor to be evicted at law, who has an equitable right to sue for the land, and has filed his bill within the limit allowed and duly pursued his remedy. *Wrixon v. Vize*. 104

2. The Court will compel a purchaser to take a title depending upon parol evidence of adverse possession, under the Statute of Limitations, 3 & 4 Will. IV. c. 27.

A testator, by his last will and testament, after appointing certain lands to his eldest son, *George*, gave all the residue of his real estate among his six younger sons, subject to the payment of his debts and some charges. Shortly afterwards he obtained a conveyance of certain freehold property, which was the subject of the controversy in the present suit, and died without having altered in any respect or republished his will, leaving his eldest son of full age.

Upon the death of the testator

in 1791, the six younger sons entered into the possession, *inter alia*, of the after-acquired property, and so continued until the present time.

*George*, the eldest son, died in 1819, leaving an infant heir. It did not appear that any claim was ever made on the part of *George* during his life, or after his death by his heir at law, and the younger sons continued during the entire of such period in the undisturbed enjoyment of the property. In 1839 the premises were sold under a decree of the Court, pronounced in a suit instituted by a judgment creditor of the testator, in which suit the infant heir was a party Defendant. Subsequently to this sale the heir died, and the suit was not revived against the next heir.—The abstract of title stated all the above matters, and was verified by two affidavits, deposing as to the fact of the possession and the receipt of rent by the younger sons: *Held*, upon objections to the title on the part of the purchaser, that by the operation of the Statute 3 & 4 Will. IV. c. 27, such a title had been created as the purchaser was bound to take.

By the effect of the Statute, after the proper period of limitation has passed, the legal fee-simple is in the party who has been in possession during that period, and he is competent to convey it to another.

There is no saving of minority given in the fifteenth section of the



Statute, and therefore the period of five years given by that section cannot be extended by reason of the infancy of the claimant. *Scott v. Nixon.* 388

3. By deed executed in the year 1809, certain lands were conveyed, subject to the payment of a sum of money, which the grantee thereby covenanted with the grantor to pay to third persons:—*Held*, that, notwithstanding the covenant, only six years' arrears of interest could be recovered.

*Held*, also, that though by the deed of 1809 there was an obligation imposed, yet there was not a trust created.

The Statute 3 & 4 Will. IV. c. 27, s. 42, is not repealed by the 3 & 4 Vict. c. 105, s. 32. *Hughes v. Kelly.* 482

#### LIQUIDATED DAMAGES.

*See DAMAGES.*

#### LUNATIC.

1. *P.* by his will directed that his widow and second son, who were the devisees of the estates, should apply a sum not exceeding 400*l.* per annum, to the maintenance and care of his son *John*, who was a lunatic, and that whoever should at any time be in possession of his L. estate, should, during the life of his said son, apply said sum annually for his comfortable support, care, and maintenance; and that said sum should be deemed, taken, and considered as a charge

thereon. The L. estate was sold after the death of the testator, under a decree in a creditor's suit, and a sum of 10,550*l.* of the purchase-money was invested in stock to the credit of the cause, to secure the payment of the lunatic's allowance, which, under an order of the Court, was fixed at 280*l.* per annum. At the death of the lunatic in 1842, the surplus of the dividends upon the stock amounted to 812*l.* 12*s.* 9*d.*; upon an application by the personal representative of the lunatic, claiming this sum as part of his personal estate, and a cross claim on part of the owners of the estate, claiming under the second son:—*Held*, that upon the true construction of the will, there was no greater charge upon the estate than what was actually required and applied for the maintenance and support of the lunatic; and that consequently, the sum in question did not form a portion of the personal estate of the lunatic.

*Held* also, that even if it did, yet that as the savings of the lunatic's maintenance, it belonged to the parties claiming under the widow and second son, who were in the situation of committee of the person of the lunatic; and that in any view of the case, the personal representative of the lunatic had no claim upon it.

*Semble*, the question had been already disposed of by the decree in the suit in 1837. *In re Ponsonby.*

2. In this case an application was made, on the part of persons representing the tenant, for a reference to the Master, to inquire and report as to the liability of a lunatic to renew the lease, under which the premises were held. The application was granted; and the right of the parties seeking the renewal was established:—*Held*, nevertheless, that the costs of the petition, and all the proceedings thereunder, should be borne by the applicants.

The proper course for a party to adopt in such a case is, to apply, in the first instance, to the committee of the estate, before he himself brings forward any application to the Court. *In re Doolan*. 442

3. A lunatic who had been convicted of an assault, ordered to be transferred to such private asylum, as the committee of the person, with the approbation of the Master, should direct. *In re M'Dermott*. 480

#### MAINTENANCE.

By deed, certain lands were conveyed to the use of *A.* for life, and from and after his decease unto and to the use of, and to and amongst such one or more of the child or children of *A.* by his then wife, as he should by deed or will limit and appoint, and to the heirs and assigns of such child or children, and for default of such appointment, to the children, as tenants in common in fee; and

for default of such issue, to *A.* in fee.

*A.*, by his will, without referring to the power, devised the lands to his wife for life, upon condition that she should thereout maintain and educate his children, in such a manner as his executors should think proper; and he directed that at the end of each year an account should be settled, and that whatever sum should be found in her hands should be placed out at interest, for the purpose of accumulating a fund for the payment of the legacies thereafter bequeathed. The testator then bequeathed to each of his younger children 500*l.*, and devised the lands to his eldest son for life, and after his decease to his heirs male and female; and directed that in case the accumulated fund should not be sufficient for the payment of the legacies to the younger children, the said lands, together with certain other lands which were not the subject of the power, should stand charged with the deficiency:—

*Held*, that the direction for the maintenance and education of the younger children, and the gift to the legacies to them were, *pro tanto*, a due execution of the power; but that the gift of so much of the rents as during the life of the wife was not required for the maintenance of the children, and the payment of their legacies, was void, and therefore went as in default of appointment.—*Crozier v. Crozier*. 353

## MARRIAGE.

*See* AGREEMENT.

DEED.

FRAUDS, STATUTE OF.

WARD.

## MARSHALLING.

1. Where there are two creditors who have taken securities for their respective debts, and the security of the first creditor ranges over two funds, while the security of the second is confined to one of these funds; the Court will marshal the assets so as to throw the person who has two funds liable to his demand, on that which is not liable to the debt of the second creditor.

The bankruptcy of the debtor will not prevent the application of the General Rule, for the assignee stands in the position of the bankrupt. *Baldwin v. Belcher; In re Cornwall.* 173

## MESNE RATES.

*See* CORPORATION.

## MINOR.

*See* COSTS.

WARD.

## MINUTES.

*See* DECREE.

REHEARING.

## MONEY OUT OF COURT.

Upon an application to draw money out of Court, which has been the subject of settlement, the instrument itself must be produced in Court. *Batt v. Cuthbertson.* 58

## MORTGAGE.

1. In 1812, *W.*, who was entitled to a mortgage executed in the year 1802, filed a bill against *V.*, the mortgagor, to foreclose and sell; the mortgagor not having appeared, a decree upon sequestration was obtained against him. In 1830, the mortgagee having in the meantime died, and the suit having been revived by his representatives, a receiver was appointed over a portion of the mortgaged premises, the residue being at the time in the possession of an earlier creditor. In the year 1833, and during the progress of the account in the Master's Office, the mortgagor died intestate, and the suit was thereupon revived against his heir at law and personal representative. The heir at law appeared in the suit, but did not answer, and the report having been made up, in 1837 a decree for a sale was pronounced. On the investigation of the title it was discovered, that shortly before the filing of the bill in 1812, on the occasion of the marriage of *V.*, the mortgagor, the equity of redemption in the mortgaged premises had been put into settlement, and limited to the mortgagor for life, with re-

the manner, in which the Corporation became seised of the soil:—*Held*, that inasmuch as the old right of pasturage in the lands of the Corporation was affected with a trust for the benefit of the inhabitants of Cashel, so the soil of the lands, which were substituted for that right, was bound by the same trust, and that whether the new right was acquired by usurpation or otherwise.

To prove the grant of 1230, by *M.*, an attested copy of an enrolment of a charter of confirmation by *Roland*, a subsequent Archbishop of Cashel, found amongst the Parliamentary Rolls, in the Rolls' Office, and which contained an *inspeximus* of the charter of grant by *M.*, was admitted as good secondary evidence. *The Attorney-General v. the Corporation of Cashel.* 294

2. Bill by a simple contract creditor against the widow (who was the personal representative), and the heir at law (who was a minor) of the deceased debtor. The personal representative having been examined in the cause on the part of the Plaintiff:—*Held*, that the Plaintiff might read her evidence at the hearing against the co-Defendant, the heir at law. *Lynch v. Joyce.* 349

#### EXCEPTIONS.

Where a Plaintiff, after having excepted to the answer of a Defendant,

amended his bill, and then obtained an order at the Rolls for liability to argue the exceptions, notwithstanding the amendments. The Court, on appeal, ordered the Plaintiff to pay the costs of the motion at the Rolls, and of the exceptions, and the Defendant to answer the amended bill, and so much of the original bill as remained unanswered, within six weeks. *Burroughs v. M'Ihreen.* 150

#### EXCESSIVE EXECUTION.

*See Power.*

#### EXECUTION EXECUTED.

In 1828 a judgment was obtained against a trader upon a bond, and warrant of attorney collateral. On the 3rd of March, 1841, the judgment creditor having presented a petition for the appointment of a receiver, under the Statute 5 & 6 William IV. c. 55, obtained a conditional order for the purpose, which was subsequently made absolute on the 23rd of April. On the 17th of March, in the same year, the trader committed an act of bankruptcy, and on the 17th of May a commission issued, under which he was duly found a bankrupt. Upon motion of the assignee, for the discharge of the receiver:—*Held*, upon appeal, confirming the order at the Rolls, that it was the absolute and not the conditional order that attached the

rents; and that, consequently, as the judgment creditor was not in the position of a creditor having "an execution executed," that the receivers should be discharged. *Burt v. Bernard.* 464

#### EXECUTOR.

*See* LEGACY.

PERSONAL REPRESENTATIVE.  
RELEASE.

#### FEME COVERT.

Bill by a *feme covert* and her infant children, the same person being the next friend of the married woman and the minors. The bill was filed in the vacation; and within the time prescribed by the General Rules, the Defendant filed a demurrer, and served a notice on the same day, apprizing the Plaintiffs that the demurrer was filed without prejudice to the right of the Defendant to move to compel the Plaintiffs to give security for costs:—*Held*, that by the filing of the demurrer, the right to compel the Plaintiffs to give security for costs was not lost.

*Held* also, notwithstanding that the same person is next friend to the infants and the *feme covert*, that the Court will compel the Plaintiffs to give security for costs.

The form of the order in such a case is, that the proceedings be stayed, until the next friend of the *feme covert* be changed, or the se-

curity for costs be given. *Drinan v. Mannix.* 154

*See* COSTS.

#### FINES.

*See* RENEWAL FINES.

#### FORECLOSURE.

*See* DECREE.

MORTGAGE.

#### FOREIGN CONTRACT.

*See* ANNUITY.

ENGLISH CONTRACT.

#### FORFEITURE.

*See* EJECTMENT.

REDEMPTION.

#### FRAUDS, STATUTE OF.

*See* AGREEMENT.

#### FURTHER DIRECTIONS.

*Semble*, it is not the rule of this Court, that an estate cannot be directed to be sold, until the cause comes back for further directions. *Lynch v. Joyce.* 349

#### GENERAL ORDER.

*See* p. 182.

#### GRAFT.

A testator seised under a lease *pur auter vie*, devised the lease upon certain trusts; upon the determi-

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nation of the lease, the trustee of the will obtained a new lease, which comprised the premises in the original lease, together with additional lands :—*Held*, that the trusts of the will did not attach upon the additional lands. *Acheson v. Fair*. 512

### GREAT SEAL.

A coroner discharged from his office for neglect of duty by the authority of the Great Seal. *Ex parte Pasley*. 34

### GUARDIAN.

*See* PUBLIC POLICY.

### HEARING.

When the Defendant does not appear at the hearing of the cause, the Plaintiff must make out his case and establish his right to the decree which he asks for. *Hayes v. Briarley*. 274

### HEIR AT LAW.

*See* EVIDENCE.

### HUSBAND AND WIFE.

*See* COSTS.

FEME COVERT.

### INFANT.

There is no saving of minority given in the fifteenth section of the Statute of Limitations, 3 & 4 Will. IV.

c. 27, and, therefore, the period of five years, given by the section, cannot be extended by reason of the infancy of the claimant. *Scott v. Nixon*. 389

*See* EVIDENCE.

FEME COVERT.

### INJUNCTION.

1. When a plaintiff comes for an *ex parte* injunction, he must state his case in the first instance fully and fairly. *Hemphill v. M'Kenna*. 3
2. This Court will not, in case of alleged acquiescence, act on light grounds against the legal right of parties ; there must be either fraud or such acquiescence as, in the view of this Court, would make it a fraud afterwards to insist upon the legal right. *Gerrard v. O'Reilly*. 414

### INSURANCE.

*A.* effected two policies of insurance upon his life, one in his own name for 425*l.*, and the other for 1700*l.*, in the name of *J.* In the year 1808, he assigned, by deed, these two policies to *J.* upon certain trusts, which were declared in a second deed of the same date, and which was referred to in the deed of assignment : these trusts were, first to pay certain debts of *A.*, and to reimburse *J.* advances which he from time to time had made to *A.*, and subject thereto, to hold the residue to form

a fund for the daughters of *A.*, in such shares as he should appoint.

Upon the death of *A.* the amount of the policies was claimed by the executor of *J.*, and at the same time notices were served upon the Company, by the administrator of *A.*, by one of his daughters, and by the husband of another daughter, cautioning the Company against paying over the amount of the policies to *L.* :—

*Held*, upon a bill of interpleader, thereupon filed by the Company, that as to the policy of 1700*l.*, there was no case of interpleader established; for that although there was no declaration in the deed of 1808, that the receipt of the trustees should be a discharge, yet that the nature of the trusts of the deed was sufficient to absolve the Company from seeing to the performance of the trusts, or the application of the money.

*Held*, also, that with regard to the policy of 425*l.*, the suit was maintainable, by reason of the claim of the administrator of *A.*; but, that as it appeared, that within a few days after the bill was filed, a second notice was served by the same party, withdrawing his demand, the Plaintiff was not justified in persisting any further in the suit, and ought to have discontinued.

Disposition of the costs of the different parties. *Glynn v. Locke.*

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*See* BANKRUPT.

MARSHALLING.

## INTEREST.

1. The established rule of this Court (which, however, is only general, and not inflexible) is, that interest cannot be recovered upon the arrears of an annuity.

Interest will be given upon the arrears of an annuity, where the person bound to pay it has been a party to the deed, by which it was created, and his acts disclose a system of gross misconduct and opposition to the Court for the purpose of evading payment.

Mere legal delay is not a sufficient ground to induce the Court to give interest; nor will a mere covenant to pay an annuity be sufficient to create an exception to the general rule.

But if there is a covenant to indemnify an annuitant against the effect of incumbrances, and the perception of the annuity has been prevented by the claims of incumbrancers, and especially if this has occurred in consequence of the acts of the covenantor, a case for damages under the covenant is clearly shewn, and this Court, in order to prevent circuity of action, obtains jurisdiction to give interest upon the arrears of the annuity. *Martyn v. Blake.* 125

2. By a decree of 1814, it was declared, that the consolidated sum for principal and interest, upon foot of a portion provided by settlement for younger children, was well charged upon the lands in the decree men-

tioned: and the said decree directed the interest to be thenceforth calculated upon this consolidated sum; upon a bill filed by the said Plaintiff, in whom the charge had become vested, the Court refused to give him the benefit of the decree, unless he consented to waive his claim to interest on the consolidated sum. *O'Connell v. M'Namara.* 411

3. By indenture of settlement of the year 1808, and made on the marriage of *A.*, certain premises, which were chattel, were conveyed to trustees for the use of *A.* for life; and from and after his decease, subject to a jointure for his intended wife, to the use of the issue of the said marriage, and for want of such issue to the use of *A.* for ever: and a power was given to *A.* by the said deed, "that he should be at liberty to raise by deed, mortgage, or by any other writing, a sum of 1000*l.*, to be applied to any purposes the said *A.* pleases, in case the said marriage shall take effect; but the said sum of 1000*l.* is not to be raised by way of the sale of said lands." *A.* having become indebted to *Q. H.* in the sum of 1500*l.*, assigned his life estate to the said *Q. H.*, by way of mortgage; and for the purpose of more effectually securing the payment of said sum of 1500*l.*, he, by virtue of the power in the said settlement, granted and appointed, by way of mortgage, the

said sum of 1000*l.* In 1817, *A.* became bankrupt, and under an order made in the matter of the bankruptcy, all the estate and interest of the assignee, and also of *Q. H.*, were purchased by the Plaintiff, and assigned by deed of the 1st of October, 1818. *A.* subsequently died. On a bill filed by the Plaintiff to have the benefit of his purchase, it was held, on appeal to the House of Lords, that by virtue of this assignment, the Plaintiff became entitled to this sum of 1000*l.*, in addition to the life estate of the bankrupt. The cause now coming on upon the report of the Master, ascertaining the amount due to the Plaintiff for principal and interest:—*Held*, that the settlement of 1808, under which the right to charge the sum of 1000*l.* arose, authorized the creation of that charge with interest. *Simpson v. O'Sullivan.* 446

4. By deed executed in the year 1809, certain lands were conveyed, subject to the payment of a sum of money, which the grantee thereby covenanted with the grantor to pay to third persons:—*Held*, that, notwithstanding the covenant, only six years' arrears of interest could be recovered. *Hughes v. Kelly.* 482
5. A testator, upon his marriage, covenanted to settle certain property, so as to secure a jointure of 400*l.* per annum for his wife. This covenant the testator never performed, but he directed the trustees of his will to



pay the interest of 5000*l.* to his wife for her life, in addition to the provisions made for her by the marriage articles, and that 1000*l.* of said sum should be paid to such person as his said wife should by deed or will direct. There were several other legacies bequeathed by the testator. The 1000*l.* was paid to the widow during her life, but no portion of the interest which accrued upon the balance of 4000*l.* in consequence of the widow's claim, under the covenant in the marriage articles, having exhausted the whole fund properly applicable for that purpose. Upon the widow's death, her personal representative claimed the arrears of interest out of the *corpus* of the fund, which was insufficient to pay all the legacies bequeathed by the testator:—*Held*, upon the true construction of the will, that the interest was given to the wife in priority to the other legacies, and that her personal representative was entitled to be paid the arrears of interest.

The interest was directed to be calculated at five per cent. according to the rule of the Court, the testator not having fixed any rate of interest. *Pepper v. Bloomfield*.

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#### INTERPLEADER.

*A.* effected two policies of insurance upon his life, one in his own name for 425*l.*; and the other for 1700*l.* in the name of *J.* In the year

1808, he assigned by deed these two policies to *J.* upon certain trusts, which were declared in a second deed of the same date, and which was referred to in the deed of assignment: These trusts were, first, to pay certain debts of *A.*, then to reimburse *J.* advances which he from time to time had made to *A.*, and subject thereto to hold the residue to form a fund for the daughters of *A.*, in such shares as he should appoint.

Upon the death of *A.* the amount of the policies was claimed by *L.*, the executor of *J.*, and at the same time notices were served upon the Company, by the administrator of *A.*, by two of his sons, by one of his daughters, and by the husband of another daughter, cautioning the Company against paying over the amount of the policies to *L.*:—

*Held*, upon a bill of interpleader, thereupon filed by the Company, that as to the policy of 1700*l.*, there was no case of interpleader established; for that although there was no declaration in the deed of 1808, that the receipt of the trustee should be a discharge, yet that the nature of the trusts of the deed was sufficient to absolve the Company from seeing to the performance of the trusts, or the application of the money.

*Held*, also, that with regard to the policy of 425*l.*, the suit was maintainable, by reason of the claim of the administrator of *A.*; but that

as it appeared, that within a few days after the bill was filed, a second notice was served by the same party, withdrawing his demand, the Plaintiff was not justified in persisting any further in the suit, and ought to have discontinued.

Disposition of the costs of the different parties. *Glynn v. Locke.*

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*See COSTS.*

#### INTOXICATION.

Principles upon which the Court acts in suits to set aside deeds, on the ground of the intoxication of the grantor. *Nagle v. Baylor.* 60

*See DEED.*

#### ISSUE.

1. A testator devised lands, of which he was seised *pur auter vie*, to his nephew, *J. C.*, for life, and then proceeded thus:—"and from and after his decease, I give and devise the same unto the issue, male and female, of the said *J. C.*, now begotten, or to be begotten on the body of his present wife, to be divided between and amongst them in such manner, shares, and proportions as the said *J. C.* shall by his last will limit and appoint, subject, nevertheless, to the provisions hereinafter particularly mentioned, viz., that the said *J. C.*, his heirs, executors, administrators, and assigns, and the persons, who shall

become entitled thereto, under this my will, shall and will pay the head landlord's rent of the said lands, and shall and will yearly and every year, during the continuance of the lease, pay or cause to be paid to *S.*, his heirs or assigns, one yearly annuity or sum of 40*l.*," &c. *J. C.* did not duly exercise his power of appointment:—

*Held*, that *J. C.* took an estate for life only: and that his issue took absolute interests as tenants in common as purchasers, and that the words "issue male and female," meant sons and daughters, or the first line of issue. *Crozier v. Crozier.* 373

#### JUDGMENT.

Creditors by judgment and recognizance, although scheduled to a trust deed, executed for their payment, are within the General Order of the 22nd June, 1842, when a suit is instituted in this Court for carrying into execution the terms of such deed by sale. *Harvey v. Lawlor.*

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2. In a creditor's suit, this Court, upon motion, with the consent of all parties, directed an account of judgments, affecting the lands to be sold, prior and contemporaneous with the filing of the bill. *Montgomery v. Southwell.* 171
3. A judgment, as such, and until sequestration issued, does not give such a lien upon a benefice as will

enable the judgment creditor to rank in priority over other debts; and therefore, in this case, where the judgment bore date in 1831, but the sequestration did not issue until 1841, the Plaintiff, whose deed of annuity was executed in 1835, was held entitled to priority over the judgment creditor. *Wise v. Beresford.* 276

### JURISDICTION.

*See* CORONER.

DEED.

EJECTMENT.

GREAT SEAL.

REDEMPTION.

RENEWAL FINES.

### LACHES.

1. Sale in 1808. The present suit was instituted in 1822, and in 1823, the principal Defendant answered the bill. No further proceedings in the cause were had until 1839, when the suit was revived:—*Held*, that as the circumstances were such, that the purchase could not be sustained, the Plaintiff was entitled to relief, notwithstanding the lapse of time. But costs were refused to both parties in consequence of the great delay; and an account of the rents was directed only from the filing of the bill of revivor and supplement. *Thornhill v. Glover.* 196
2. A lease made to a person standing in the position of guardian, and at

the same time filling the characters of agent, receiver, and tenant, directed to be set aside upon the equity arising out of these relations, and upon the ground of public policy, and with costs, notwithstanding that a period of eleven years had elapsed after the granting of the lease before the institution of the suit. But the account was limited to the filing of the bill, by reason of the delay. *Mulhallen v. Marum.* 317

### LANDLORD.

*See* COSTS.

EJECTMENT.

POSSESSORY BILL.

REDEMPTION.

### LEASE.

*See* CORPORATION.

COVENANT.

DEED.

LACHES.

PUBLIC POLICY.

### LEGACY.

A testator, upon his marriage, covenanted to settle certain property, so as to secure a jointure of 4000*l.* per annum for his wife. This covenant the testator never performed; but he directed the trustees of his will to pay the interest of 5000*l.* to his wife for her life, in addition to the provisions made for her by the marriage articles, and that 1000*l.* of

said sum should be paid to such person as his said wife should by deed or will direct. There were several other legacies bequeathed by the testator. The 1000*l.* was paid to the widow during her life, but no portion of the interest which accrued upon the balance of 4000*l.*, in consequence of the widow's claim, under the covenant in the marriage articles, having exhausted the whole fund properly applicable for that purpose. Upon the widow's death, her personal representative claimed the arrears of interest out of the corpus of the fund, which was insufficient to pay all the legacies bequeathed by the testator:—*Held*, upon the true construction of the will, that the interest was given to the wife in priority to the other legacies, and that her personal representative was entitled to be paid the arrears of interest. *Pepper v. Bloomfield.* 499

2. A testator seized of an estate *pur auter vie*, and possessed of personal property to the amount of about 4500*l.*, by his will bequeathed "the sum of 1500*l.*, the other part of the 4500*l.* together with any further property," in trust for the use of his father, to be disposed of by him, share and share alike, as he by deed or will should appoint, among testator's brothers, *H.* and *J.*, and the daughter or daughters of his sister *E.* The will contained a residuary clause in these words: "as to the rest, residue, and remain-

der of my worldly estate and fortune, not heretofore and hereby disposed of, in trust, to the use of my affectionate father, *J. C.*, and his heirs, executors, and administrators for ever:"—*Held*, that the estate, *pur auter vie*, passed under the residuary clause, and not under the words "any further property," upon the true construction of the whole will. *Acheson v. Fair.* 512

#### LETTERS.

*See* AGREEMENT.

FRAUDS, STATUTE OF.

#### LIFE ESTATE.

A testator seized of an estate *pur auter vie*, and possessed of personal property to the amount of about 4500*l.*, by his will bequeathed "the sum of 1500*l.*, the other part of the 4500*l.* together with any further property," in trust, for the use of his father, to be disposed of by him, share and share alike, as he by deed or will should appoint, among testator's brothers *H.* and *J.* and the daughter or daughters of his sister *E. E.* had several daughters:—*Held*, that the testator's father took a "life interest in the 1500*l.*, together with any further property," and that on his decease, without having executed his power of appointment, *H. J.*, and each of the daughters of *E.*, were entitled to equal shares. *Acheson v. Fair.* 512

*See* ESTATE FOR LIFE.

SALE, JUDICIAL.

## LIMITATION, STATUTES OF.

1. In 1812, *W.*, who was entitled to a mortgage executed in the year 1802, filed a bill against *V.*, the mortgagor to foreclose and sell; the mortgagor, not having appeared, a decree upon sequestration was obtained against him. In 1830, the mortgagee having in the meantime died, and the suit having been revived by his representatives, a receiver was appointed over a portion of the mortgaged premises, the residue being at the time in the possession of an earlier creditor. In the year 1833, and during the progress of the account in the Master's Office, the mortgagor died intestate, and the suit was thereupon revived against his heir at law and personal representative. The heir at law appeared in the suit, but did not answer, and the report having been made up, in 1837 a decree for a sale was pronounced. On the investigation of the title it was discovered, that shortly before the filing of the bill in 1812, on the occasion of the marriage of *V.*, the mortgagor, the equity of redemption in the mortgaged premises had been put into settlement, and limited to the mortgagor for life, with remainder to trustees for a term of years, to secure a jointure for his intended wife, and portions for the younger children of the marriage, with remainder to his first and other sons in tail male. This settlement, however, was never registered. In

the month of May, 1838, the Plaintiffs filed the present supplemental bill against the parties claiming under the settlement, seeking the benefit of the decree and the former proceedings. The widow and younger children having set up as their defence, the Statute of Limitations (3 & 4 Will. IV. c. 27):—

*Held*, that the possession of the mortgagor was not adverse to the mortgagee, when the Statute passed, the possession being partly in the Court and partly in the earlier incumbrancer; and that there was, therefore, nothing to take away from the mortgagee the benefit of the fifteenth section.

A bill of foreclosure is not a suit in Equity for the recovery of the money charged upon the land, although it may lead to that; but it is, in effect, a suit to obtain the equity of redemption, which is, in the view of Equity, an actual estate: *Quære*, therefore, as to *Dearman v. Wyche* (9 Simons, 570).

The right to file a bill of foreclosure, whether the mortgage be legal or equitable, falls within the twenty-fourth section of the 3 & 4 Will. IV. c. 27, and the 7 Will. IV. & 1 Vict. c. 28; and the time is governed by the legal right of the party to bring an action, or if he have not the legal estate, by the right which he would have had, if his estate had been a legal instead of an equitable one.

Though the appointment of a re-

ceiver does not prevent the bar of the Statute<sup>3</sup> from operating against stranger, yet it will serve to prevent, at least in this Court, time from running in favour of a stranger to the suit.

A suit in a Court of Equity, properly instituted, will prevent time from running; and a Court of Law ought to act upon this principle, the same rule being prescribed by the Statute for both Courts. This Court, however, will protect its own jurisdiction, and will not permit a suitor to be evicted at law, who has an equitable right to sue for the land, and has filed his bill within the limit allowed and duly pursued his remedy. *Wrixon v. Vize*. 104

2. The Court will compel a purchaser to take a title depending upon parol evidence of adverse possession, under the Statute of Limitations, 3 & 4 Will. IV. c. 27.

A testator, by his last will and testament, after appointing certain lands to his eldest son, *George*, gave all the residue of his real estate among his six younger sons, subject to the payment of his debts and some charges. Shortly afterwards he obtained a conveyance of certain freehold property, which was the subject of the controversy in the present suit, and died without having altered in any respect or republished his will, leaving his eldest son of full age.

Upon the death of the testator

in 1791, the six younger sons entered into the possession, *inter alia*, of the after-acquired property, and so continued until the present time. *George*, the eldest son, died in 1819, leaving an infant heir. It did not appear that any claim was ever made on the part of *George* during his life, or after his death by his heir at law, and the younger sons continued during the entire of such period in the undisturbed enjoyment of the property. In 1839 the premises were sold under a decree of the Court, pronounced in a suit instituted by a judgment creditor of the testator, in which suit the infant heir was a party Defendant. Subsequently to this sale the heir died, and the suit was not revived against the next heir.—The abstract of title stated all the above matters, and was verified by two affidavits, deposing as to the fact of the possession and the receipt of rent by the younger sons: *Held*, upon objections to the title on the part of the purchaser, that by the operation of the Statute 3 & 4 Will. IV. c. 27, such a title had been created as the purchaser was bound to take.

By the effect of the Statute, after the proper period of limitation has passed, the legal fee-simple is in the party who has been in possession during that period, and he is competent to convey it to another.

There is no saving of minority given in the fifteenth section of the

Statute, and therefore the period of five years given by that section cannot be extended by reason of the infancy of the claimant. *Scott v. Nixon.* 388

3. By deed executed in the year 1809, certain lands were conveyed, subject to the payment of a sum of money, which the grantee thereby covenanted with the grantor to pay to third persons:—*Held*, that, notwithstanding the covenant, only six years' arrears of interest could be recovered.

*Held*, also, that though by the deed of 1809 there was an obligation imposed, yet there was not a trust created.

The Statute 3 & 4 Will. IV. c. 27, s. 42, is not repealed by the 3 & 4 Vict. c. 105, s. 32. *Hughes v. Kelly.* 482

#### LIQUIDATED DAMAGES.

*See DAMAGES.*

#### LUNATIC.

1. *P.* by his will directed that his widow and second son, who were the devisees of the estates, should apply a sum not exceeding 400*l.* per annum, to the maintenance and care of his son *John*, who was a lunatic, and that whoever should at any time be in possession of his L. estate, should, during the life of his said son, apply said sum annually for his comfortable support, care, and maintenance; and that said sum should be deemed, taken, and considered as a charge

thereon. The L. estate was sold after the death of the testator, under a decree in a creditor's suit, and a sum of 10,550*l.* of the purchase-money was invested in stock to the credit of the cause, to secure the payment of the lunatic's allowance, which, under an order of the Court, was fixed at 280*l.* per annum. At the death of the lunatic in 1842, the surplus of the dividends upon the stock amounted to 812*l.* 12*s.* 9*d.*; upon an application by the personal representative of the lunatic, claiming this sum as part of his personal estate, and a cross claim on part of the owners of the estate, claiming under the second son:—*Held*, that upon the true construction of the will, there was no greater charge upon the estate than what was actually required and applied for the maintenance and support of the lunatic; and that consequently, the sum in question did not form a portion of the personal estate of the lunatic.

*Held* also, that even if it did, yet that as the savings of the lunatic's maintenance, it belonged to the parties claiming under the widow and second son, who were in the situation of committee of the person of the lunatic; and that in any view of the case, the personal representative of the lunatic had no claim upon it.

*Semble*, the question had been already disposed of by the decree in the suit in 1837. *In re Ponsonby.*

2. In this case an application was made, on the part of persons representing the tenant, for a reference to the Master, to inquire and report as to the liability of a lunatic to renew the lease, under which the premises were held. The application was granted; and the right of the parties seeking the renewal was established:—*Held*, nevertheless, that the costs of the petition, and all the proceedings thereunder, should be borne by the applicants.

The proper course for a party to adopt in such a case is, to apply, in the first instance, to the committee of the estate, before he himself brings forward any application to the Court. *In re Doolan*. 442

3. A lunatic who had been convicted of an assault, ordered to be transferred to such private asylum, as the committee of the person, with the approbation of the Master, should direct. *In re M'Dermott*. 480

#### MAINTENANCE.

By deed, certain lands were conveyed to the use of *A.* for life, and from and after his decease unto and to the use of, and to and amongst such one or more of the child or children of *A.* by his then wife, as he should by deed or will limit and appoint, and to the heirs and assigns of such child or children, and for default of such appointment, to the children, as tenants in common in fee; and

for default of such issue, to *A.* in fee.

*A.*, by his will, without referring to the power, devised the lands to his wife for life, upon condition that she should thereout maintain and educate his children, in such a manner as his executors should think proper; and he directed that at the end of each year an account should be settled, and that whatever sum should be found in her hands should be placed out at interest, for the purpose of accumulating a fund for the payment of the legacies therein-after bequeathed. The testator then bequeathed to each of his younger children 500*l.*, and devised the lands to his eldest son for life, and after his decease to his heirs male and female; and directed that in case the accumulated fund should not be sufficient for the payment of the legacies to the younger children, the said lands, together with certain other lands which were not the subject of the power, should stand charged with the deficiency:—

*Held*, that the direction for the maintenance and education of the younger children, and the gift to the legacies to them were, *pro tanto*, a due execution of the power; but that the gift of so much of the rents as during the life of the wife was not required for the maintenance of the children, and the payment of their legacies, was void, and therefore went as in default of appointment.—*Crozier v. Crozier*. 353



MARRIAGE.

*See* AGREEMENT.

DEED.

FRAUDS, STATUTE OF.

WARD.

MARSHALLING.

1. Where there are two creditors who have taken securities for their respective debts, and the security of the first creditor ranges over two funds, while the security of the second is confined to one of these funds; the Court will marshal the assets so as to throw the person who has two funds liable to his demand, on that which is not liable to the debt of the second creditor.

The bankruptcy of the debtor will not prevent the application of the General Rule, for the assignee stands in the position of the bankrupt. *Baldwin v. Belcher; In re Cornwall.* 173

MESNE RATES.

*See* CORPORATION.

MINOR.

*See* COSTS.

WARD.

MINUTES.

*See* DECREE.

REHEARING.

MONEY OUT OF COURT.

Upon an application to draw money out of Court, which has been the subject of settlement, the instrument itself must be produced in Court. *Batt v. Cuthbertson.* 58

MORTGAGE.

1. In 1812, *W.*, who was entitled to a mortgage executed in the year 1802, filed a bill against *V.*, the mortgagor, to foreclose and sell; the mortgagor not having appeared, a decree upon sequestration was obtained against him. In 1830, the mortgagee having in the meantime died, and the suit having been revived by his representatives, a receiver was appointed over a portion of the mortgaged premises, the residue being at the time in the possession of an earlier creditor. In the year 1833, and during the progress of the account in the Master's Office, the mortgagor died intestate, and the suit was thereupon revived against his heir at law and personal representative. The heir at law appeared in the suit, but did not answer, and the report having been made up, in 1837 a decree for a sale was pronounced. On the investigation of the title it was discovered, that shortly before the filing of the bill in 1812, on the occasion of the marriage of *V.*, the mortgagor, the equity of redemption in the mortgaged premises had been put into settlement, and limited to the mortgagor for life, with re-

mainder to trustees for a term of years, to secure a jointure for his intended wife, and portions for the younger children of the marriage, with remainder to his first and other sons in tail male. This settlement, however, was never registered. In the month of May, 1838, the Plaintiffs filed the present supplemental bill against the parties claiming under the settlement, seeking the benefit of the decree and the former proceedings. The widow and younger children having set up as their defence, the Statute of Limitations (3 & 4 Will. IV. c. 27):—

*Held*, that the possession of the mortgagor was not adverse to the mortgagee, when the Statute passed, the possession being partly in the Court and partly in the earlier incumbrancer; and that there was, therefore, nothing to take away from the mortgagee the benefit of the fifteenth section.

A bill of foreclosure is not a suit in Equity for the recovery of the money charged upon the land, although it may lead to that; but it is, in effect, a suit to obtain the equity of redemption, which is, in the view of Equity, an actual estate: *Quare*, therefore as to *Dearman v. Wyche* (9 Simons, 570.)

The right to file a bill of foreclosure, whether the mortgage be legal or equitable, falls within the twenty-fourth section of the 3 & 4 Will. IV. c. 27, and 7 Will. IV. & 1 Vict. c. 28; and the time is

governed by the legal right of the party to bring an action, or if he have not the legal estate, by the right which he would have had, if his estate had been a legal instead of an equitable one. *Wrisson v. Vise*. 104

2. Bill filed by a mortgagee against the executors and persons claiming under the will of the mortgagor, who had thereby created a trust for the payment of the mortgage debt.

The decree directed that the personal estate of the testator should be first applied in the payment of his debts, and then declared that the Plaintiff should be entitled to the benefit of his mortgage security, in case such personal estate should prove insufficient; and that in case the premises comprised in the mortgage should prove insufficient, the Plaintiff should be considered as a specialty creditor for the residue of his demand, and entitled to the benefit of the trusts of the testator's will. *Marshall v. M'Aravey*. 232

3. Frame of decree in a suit for foreclosure and sale, where there are mortgages before the Court, *puisne* to that of the Plaintiff. *Davis v. Rowan*. 478

*See* EJECTMENT.

REDEMPTION.

NEXT FRIEND.

*See* COSTS.

FEME COVERT.

NOTICE.

1. *Seemle*, if a vendor, who has a right upon equitable grounds to impeach a sale, not only neglects to do so, but by the subsequent execution of other deeds, adopts the sale, and acts upon it as binding; he cannot afterwards impeach the title of equitable mortgagees, who, subsequently to this act, advanced their money *bonâ fide*, and without notice to the purchaser. *Nagle v. Baylor*. 60
2. The rule, which affects a party with notice, where his solicitor has had notice in the same transaction, or so recently that it is impossible to suppose he could have forgotten it, is in itself sound, but should not be carried too far. *Gerrard v. O'Reilly*. 414

ORDERS.

*See* GENERAL ORDER.

PAROL EVIDENCE.

The Court will compel a purchaser to take a title depending upon parol evidence of adverse possession, under the Statute of Limitations, 3 & 4 Will. IV. c. 27. *Scott v. Nixon*. 388

*See* EVIDENCE.

PARTIES.

1. Creditors by judgment and recognizance, although scheduled to a trust deed, executed for their pay-

ment, are within the General Order of the 22nd June, 1842, when a suit is instituted in this Court for carrying into execution the terms of such deed by sale. *Harvey v. Lalor*. 168

2. *Seemle*, that when a bill for redemption is filed within the time prescribed by the Statute, by the parties who are entitled to redeem, the Court has jurisdiction to allow the cause to stand over, in order that formal parties may be added. *Malone v. Geraghty*. 250

PENAL FINES.

*See* RENEWAL FINES.

PENALTY.

A lessee covenanted, during the continuance of the demise, not to raise or extend a certain building, under the penalty of the yearly rent reserved in the lease, the same to be recovered by distress or otherwise in the same manner as the said yearly rent.

*Held*, that this double rent was in the nature of liquidated damages for a breach of the covenant, and not a penalty, properly so called. *Gerrard v. O'Reilly*. 414

PETITION.

*See* TRUSTEE.

PLEADING.

*See* PARTIES.

POSSESSORY BILL.

## INDEX TO THE PRINCIPAL MATTERS. 563

### POLICY OF INSURANCE.

*See* INSURANCE.

MARSHALLING.

### POSSESSORY BILL.

A possessory bill ought to state that the Plaintiff has been in the actual, quiet, and peaceable possession of the premises in question, for three years at least, or from the filing of the bill, saving the disturbances given by the Defendant; and if there has been a mixed possession partly by the Plaintiff, and partly by the Defendant, so that it cannot be said that either of the parties had a triennial possession, this Court will not interfere, but will leave the parties to settle their rights at law. *Hemphill M'Kenna*.

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### POWER.

1. By a marriage settlement, a sum of 2000*l.* was provided for the portion of the younger children of the marriage, to be divided amongst them in such proportions, as the father should, by deed or will, direct: and, in default of appointment, equally. The father, by his will, after reciting his power, bequeathed as follows:—"I leave and bequeath unto my said daughter *Harriett* a further sum of 200*l.*, to have me properly buried in this island, and to pay what small debts I may owe in this island at my de-

cease:—*Held*, that this was a bad appointment, and that the 200*l.* should go as if unappointed. *Hay v. Watkins*. 339

2. By deed, certain lands were conveyed to the use of *A.* for life, and from and after his decease unto and to the use of, and to and amongst such one or more of the child or children of *A.*, by his then wife, as he should by deed or will limit and appoint, and to the heirs and assigns of such child or children, and for default of such appointment, to the children as tenants in common in fee; and for default of such issue, to *A.* in fee.

*A.*, by his will, without referring to the power, devised the lands to his wife for life, upon condition that she should thereout maintain and educate his children, in such manner as his executors should think proper; and he directed that at the end of each year an account should be settled, and that whatever sum should be found in her hands should be placed out at interest, for the purpose of accumulating a fund for the payment of the legacies thereafter bequeathed. The testator then bequeathed to each of his younger children 500*l.*, and devised the lands to his eldest son for life, and after his decease, to his heirs male and female; and directed that in case the accumulated fund should not be sufficient for the payment of the legacies to the younger children, the said lands, together with certain

other lands which were not the subject of the power, should stand charged with the deficiency:—*Held*, that the devise to the eldest son in fee in remainder was a good appointment under the power, although the gift to the wife was void.

*Held*, also, that the direction for the maintenance and education of the younger children, and the gift of the legacies to them were, *pro tanto*, a due execution of the power; but that the gift of so much of the rents as, during the life of the wife, was not required for the maintenance of the children, and the payment of their legacies, was void, and therefore went as in default of appointment.

A power to give the estate authorizes, in Equity, a sale and a gift of the produce of the estate.

A power must not be exceeded, nor its directions evaded; but where there is no prohibition, every thing which is legal, and within the limits of the authority, should be supported.

There ought not to be any trifling distinctions between power and property upon merely technical grounds. *Crozier v. Crozier*. 353

#### PRACTICE.

*See* ACCOUNT.

AGENT.

AMENDMENT.

COSTS.

DECREE.

DEFENDANT.

*See* ECCLESIASTICAL LAW.

EXCEPTIONS.

FEME COVERT.

FURTHER DIRECTIONS.

INJUNCTION.

INTEREST.

LUNATIC.

MORTGAGE.

PARTIES.

PLEADING.

PRODUCTION OF DEED.

REHEARING.

TRUSTEE.

#### PRINCIPAL AND AGENT.

*See* AGENT.

#### PRIORITY.

*See* INTEREST.

LEGACY.

WILL.

#### PROVISIONAL ASSIGNEE.

The provisional assignee of an insolvent debtor is not entitled to his costs against the Plaintiff. *Hughes v. Kelly*. 482

#### PRODUCTION OF DEED.

Upon an application to draw money out of Court, which has been the subject of settlement, the instrument itself must be produced in Court. *Batt v. Cuthbertson*. 58

#### PUBLIC POLICY.

A lease made to a person standing in the position of guardian, and at the

same time filling the characters of agent, receiver, and tenant, directed to be set aside upon the equity arising out of these relations, and upon the ground of public policy, and with costs, notwithstanding that a period of eleven years had elapsed, after the granting of the lease, before the institution of the suit.

The account, however, was limited to the filing of the bill by reason of the delay. *Mulhallen v. Marum*.

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#### PURCHASER.

*See* DOUBTFUL TITLE.

SALE, JUDICIAL.

VENDOR AND PURCHASER.

#### RECEIVER.

Though the appointment of a receiver does not prevent the bar of the Statute from operating against a stranger, yet it will serve to prevent, at least in this Court, time from running in favour of a stranger to the suit. *Wrixon v. Vise*. 104

#### REDEMPTION.

1. Where a lease had been evicted for non-payment of rent, under the Ejectment Statutes in Ireland, and an equitable mortgagee of the tenant's interest filed a bill for redemption against the landlord:—*Held*, that he was entitled to redeem the premises evicted, under

the earliest of those Statutes, the 11 Anne, c. 2.

The general rule is, to make the party seeking a redemption pay the costs of the suit; but the Court has jurisdiction to throw the costs on the landlord, and the question depends on its own discretion. *Malone v. Geraghty*. 239

2. *Seem*, Where a bill for redemption is filed within the time prescribed by the Statute, by the parties who are entitled to redeem, the Court has jurisdiction to allow the cause to stand over, in order that formal parties may be added.

This Court has an original jurisdiction for the relief of tenants, whose leases have been evicted for non-payment of rent; and this ancient jurisdiction has not been destroyed, but merely restricted, by the Irish Ejectment Statutes, which operate as a Statute of Limitations, and oblige the tenant, if he thinks fit to have recourse to a Court of Equity, to do so within the particular times specified in those Statutes.

The words of the fourth section of the 11 Anne, c. 2, cannot be limited to mean assignees at law, but must be held to include every interest under the lessee. *Malone v. Geraghty*. 250

#### REHEARING.

A decree must be made up before the cause can be reheard; and if a

petition of rehearing is presented while the decree remains in minutes, it will be dismissed with costs. *Malone v. Geraghty.* 250

#### RELEASE.

An executor contracted with legatees for the purchase of their legacies, which were accordingly assigned to a trustee for him in consideration of sums of money less in amount than the legacies. It was admitted that the transaction could not be sustained for the benefit of the executor:—*Held*, that the deed of assignment did not operate as a release of the estate, and could not be upheld as against the legatees, who executed it, for the benefit of their co-legatees. *Barton v. Hassard.* 461

#### RENEWAL.

The *habendum* of a lease was in these terms: "To have, &c., to *T. S.*, his heirs, &c., for and during the natural life and lives of *J. B.*, *W. B.*, and *E. B.*, or the longest liver of them, or whatever life or lives shall for ever or hereafter be nominated or appointed, added or inserted, on the back of this indenture, or a label affixed thereunto, paying for each and every life so renewed, a pepper-corn, if demanded, yielding, &c." The lease did not contain any technical covenant for renewal.

*Semble*, the *habendum* amounted to a covenant for perpetual renewal. *Sheppard v. Doolan.* 1

#### RENEWAL FINES.

*H.* demised certain premises to *B.* for three lives, with a covenant to renew from time to time, on the nomination of a life, and payment of a fine of 15*l.* within six months after the death of each *cestui que vie*. *B.* underlet the same premises to *C.*; also for three lives, with a similar covenant for renewal, and at a like renewal fine, and with a proviso, that in case *C.* should neglect to nominate a new life, and pay the fine, within six months after the death of each *cestui que vie*, *C.* should pay a fine of 20*s.* for every month during which he should so neglect to add such life and pay such fine. *C.* subsequently purchased the interest of *H.*, and no renewal was obtained by either party for nearly half a century.

The person claiming under *C.* being a ward of the Court, a petition was presented in the minor matter on the part of the person representing *B.*, for a reference as to what was due for rent and renewal fines, on foot of the lease from *B.* to *C.*; and also for an account of renewal and septennial fines, and interest, on account of the original lease from *H.* to *B.*; and an order for that purpose was obtained. Shortly afterwards, in consequence of the death of a party materially interested, a second petition was presented, praying, in addition to the above matters, for a reference as to what was due for

finer and penal rent under the said lease from *B.* to *C.*; but the order made thereon was in the same terms as the preceding one, and was silent as to the penal rents:—*Held*, that the Master, in proceeding under this reference, was not warranted in taking an account of the penal fines due on foot of the lease from *B.* to *C.*

*Semble*, that it was to be inferred from the circumstances of the case, that the parties had entered into an agreement not to require any renewals to be executed.

Generally speaking, an outstanding legal estate is not an answer to the obligation on the part of a tenant to pay the renewal fines. *In re Colthurst.* 35

#### RESIDUARY CLAUSE.

A testator seized of an estate *pur auter vie*, and possessed of personal property to the amount of about 4500*l.*, by his will bequeathed “the sum of 1500*l.*, the other part of the 4500*l.* together with any further property,” in trust for the use of his father to be disposed of by him, share and share alike, as he by deed or will should appoint, among testator’s brothers *H.* and *J.*, and the daughter or daughters of his sister *E.* The will contained a residuary clause in these words: “As to the rest, residue, and remainder of my worldly estate and fortune, not heretofore and hereby disposed of,

in trust to the use of my affectionate father, *J. C.*, and his heirs, executors, and administrators for ever:”—

*Held*, that the estate *pur auter vie* passed under the residuary clause, and not under the words “any further property,” upon the construction of the whole will. *Acheson v. Fair.* 512

*See* LEGACY.

WILL.

#### REVOCATION.

A testatrix, by her will, devised Blackacre to her nephew *F.* for life, with remainder to his first and other sons in tail male, remainder to *R.* and several other nephews successively for like estates; and she devised Whiteacre to *R.* for life, remainder to his first and other sons in tail male, with remainders over to *F.* and several other nephews in the same manner. Afterwards she made a codicil, and reciting the gifts to *F.* and *R.* and declaring her wish to give to *R.* the property there devised to *F.*, and *vice versa*, revoked the said gifts, and devised the provision by her will given to *F.*, to *R.*, his heirs, executors, administrators, and assigns, and in lieu thereof devised to *F.*, his heirs, executors, administrators, and assigns, the property she had by her will given to *R.*:—*Held*, that the limitations over in the will to the other nephews of the testatrix were revoked, and that *R.* and *F.*



respectively took absolute interests in their gifts. *Murray v. Johnston*.

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### SALE, JUDICIAL.

1. When the purchaser of an interest sold under a decree of the Court, thereby acquires information as to a supposed defect in the title to that interest, and improperly avails himself of those means of information, by purchasing the estate of the person, who alone could have taken advantage of the supposed defect: such purchaser will not be allowed the benefit of the rule as to doubtful titles. *Sheppard v. Doolan*. 1
2. The purchaser of an estate *pur auter vie*, sold under a decree of the Court of Chancery:—*Held*, not entitled to be discharged from his purchase, in a case in which the sole *cestui que vie* died, subsequently to the bidding, and before the Master's report could have been confirmed according to the practice of the Court. *Vesey v. Elwood*. 74
3. Where a life estate was sold under a decree, and the tenant for life died, subsequently to the lodgment of the one-fourth of the purchase money, and the obtaining of the rule *nisi*, but prior to the confirmation of the sale:—*Held*, that the contract was not complete, until the sale was confirmed by the order of Court, and that the purchaser was

not bound to complete his purchase. *Vincent v. Going*. 75

Principles upon which the Court acts in suits to impeach purchases made under a decree of a Court of Equity. *Thornhill v. Glover*. 915

### SAVINGS OF ESTATE.

*See* LUNATIC.

### SECURITY FOR COSTS.

*See* COSTS.

### SEQUESTRATION.

*See* CHARGE UPON BENEFICE.  
JUDGMENT.

### SETTLEMENT.

1. The Court has not jurisdiction to compel a male ward with whom a marriage has been solemnized, without its consent, on attaining his full age, to execute a settlement of his estate so as to exclude his wife from all participation in the property. *In re Murray*. 83
2. By a settlement of the 3rd of July, 1801, certain freehold lands were settled by *T. G.* on his eldest son *J. G.*, and his issue in strict settlement; with an ultimate remainder to "*T. G.* (the second son of the settlor), his heirs and assigns;" and by the same settlement certain other

lands, which were partly freehold and partly chattel, were settled on *T. G.* for life; "and from and after the decease of the said *T. G.* to the several uses, intents, and purposes as are hereinbefore expressed and declared, respecting' the first set of lands, and subject to which those lands were, in the previous part, limited to the issue of *T. G.*, "to and for the use and benefit of the said *T. G.*, subject to the provisions heretofore made for the issue of the said marriage:—*Held*, that the second class of lands were settled to the same uses as were declared respecting the first, and that *T. G.* took an estate in both lands in fee. *Garde v. Garde.*

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#### SOLICITOR.

1. The trustees in this case were allowed their costs out of the fund, but the Court refused to direct the costs of the relators to be taxed as between solicitor and client. *Attorney-General v. Drummond.* 162
2. A bill of costs had been referred for taxation, and the parties agreed in the office upon the sum at which they were to be reported; subsequently, the client having discovered certain entries in his own handwriting of advances made to the solicitor, and for which he had received no credit, applied that the costs should be sent back to the

Master for taxation. The application was refused with costs. *Austin v. Chambers.* 178

3. By a decree of this Court, the Defendant was ordered to pay certain costs to the Plaintiffs: these costs were afterwards received from the Defendant by the Plaintiffs' solicitor, under a power of attorney from his clients. The Defendant then appealed from the decree, which was thereupon reversed, and the bill was eventually dismissed with costs. It was admitted that the amount of costs paid by the Defendant to the Plaintiffs' solicitor was not paid over, but retained with the assent of the Plaintiffs, and applied in payment of the costs incurred in defence of the appeal, as well as the other costs then due:—*Held*, that though there was no actual transfer of the money, yet that, in point of law, the payment to the principal was complete; and that the Defendant was therefore not entitled to an order upon the solicitor for the repayment of the amount of the costs. *Smith v. Clarke.* 344
4. The rule which affects a party with notice, when his solicitor has had notice in the same transaction, or so recently that it is impossible to suppose he could have forgotten it, is in itself sound, but should not be carried too far. *Gerrard v. O'Reilly.* 414

*See* INTEREST.

STATUTE OF FRAUDS.

*See* AGREEMENT.

STATUTE OF LIMITATIONS.

*See* LIMITATIONS.

TENANT FOR LIFE.

*See* ESTATE FOR LIFE.  
ISSUE.

TRUST.

1. Creditors by judgment and recognition, although scheduled to a trust deed executed for their payment, are within the General Order of the 22nd of June, 1842, when a suit is instituted in this Court for carrying into execution the terms of such deed by sale. *Harvey v. Lawlor.* 168
2. In 1230 *M.*, Archbishop of Cashel, with the consent of the Dean and Chapter, granted to the Corporation of Cashel, the town of Cashel; and also granted to the said Corporation and their tenants, and all inhabitants of the said town, free pasture in all his lands, except meadows, &c. Subsequently the Corporation became seised in fee of the soil of the lands over which free pasture had been so granted. There was not any evidence to show the time or the manner in which the Corporation became seised of the soil:—*Held*, that inasmuch as the old right of pasturage in the lands of the Corporation was affected with

a trust for the benefit of the inhabitants of Cashel, so the soil of the lands, which were substituted for that right, was bound by the same trust, and that whether the new right was acquired by usurpation or otherwise. *Attorney General v. The Corporation of Cashel.* 294

*See* MAINTENANCE.

TRUSTEE.

Form of the order for the appointment of a new trustee, under the Statute 1 Will. IV. c. 60, in the room of a trustee, who was resident out of the jurisdiction, where the trust fund consisted merely of Government stock in the Bank of Ireland. *In re Chambers.* 496

VENDOR AND PURCHASER.

1. The *habendum* of a lease was in these terms: "To have, &c., to *T. S.*, his heirs, &c., for and during the natural life and lives of *J. B.*, *W. B.*, and *E. B.*, or the longest liver of them, or whatever life or lives shall for ever or hereafter be nominated or appointed, added or inserted, on the back of this indenture, or a label affixed thereunto, paying for each and every life so renewed, a pepper-corn, if demanded, yielding, &c." The lease did not contain any technical covenant for renewal.  
*Semble*, the *habendum* amounted to a covenant for perpetual renewal. *Sheppard v. Doolan.* 1

2. The purchaser of an estate *pur auter vie*, sold under a decree of the Court of Chancery:—*Held*, not entitled to be discharged from his purchase, in a case in which the sole *cestui que vie* died, subsequently to the bidding, and before the Master's report could have been confirmed according to the practice of the Court. *Vesey v. Elwood*.

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3. Where a life estate was sold under a decree, and the tenant for life died, and subsequently to the lodgment of one-fourth of the purchase money, and the obtaining of the rule *nisi*, but prior to the confirmation of the sale:—*Held*, that the contract was not complete until the sale was confirmed by the order of the Court, and that the purchaser was not bound to complete his purchase. *Vincent v. Going*.

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#### WARD.

The Court has not jurisdiction to compel a male ward, with whom a marriage has been solemnized, without its consent, on attaining his full age, to execute a settlement of his estate so as to exclude his wife from all participation in the property. *In re Murray*.

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*Semble*, it is not the rule of this Court, that an estate cannot be sold until the cause comes back for further directions. *Lynch v. Joyce*.

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#### WILL.

On the marriage of *E.* her grandmother, who was not under any legal or moral obligation to provide for her, signed the following memorandum, which had been written by her agent, at her request, viz.—*Lady T.* has desired *C.* to notify, that, “she intends leaving *E.*, 2000*l.*, to bear interest from her death, and to be secured by a bond. She has further desired *C.* to say, that this is the provision she intends making for *E.* on her intended marriage.” On the same day, *C.*, the agent, wrote to the intended husband, *S.*, stating that *Lady T.* intended to give 2000*l.*, at her death, and a house at Cheltenham. Subsequently *C.* wrote to *Lady T.*, stating that *S.* wished to have the bond perfected, and also to have the house which *Lady T.* intended to give. This letter was read to *Lady T.*, by *E.*, and she then desired *E.* to keep it, adding, that it related to the business with *S.* The intended marriage was shortly afterwards solemnized in the lifetime of the grandmother; who, however, had been for some time unable to attend to business, in consequence of indisposition, and who died without having executed either the bond for 2000*l.*, or a conveyance of the house at Cheltenham.

*Held*, that the memorandum, letters, and subsequent marriage, constituted a sufficient agreement

within the Statute of Frauds: binding upon the representatives of Lady *T.*, both as to the bond for 2000*l.*, and the house at Cheltenham.

Previously to the execution of the memorandum, Lady *T.* had bequeathed the house to *C.* *Quære*, whether under the new Statute of Wills (1 Vict. c. 26), the contract rendered *C.* a trustee, or whether he took as devisee, subject to the contract? *Saunders v. Cramer.* 87

2. By deed, certain lands were conveyed to the use of *A.* for life, and from and after his decease unto and to the use of, and to and amongst such one or more of the child or children of *A.*, by his then wife, as he should by deed or will limit and appoint, and to the heirs and assigns of such child or children, and for default of such appointment, to the children as tenants in common in fee; and for default of such issue, to *A.* in fee.

*A.*, by his will, without referring to the power, devised the lands to his wife for life, upon condition that she should thereout maintain and educate his children, in such manner as his executors should think proper; and he directed that at the end of each year an account should be settled, and that whatever sum should be found in her hands should be placed out at interest, for the purpose of accumulating a fund for the payment of the lega-

cies thereafter bequeathed. The testator then bequeathed to each of his younger children 500*l.*, and devised the lands to his eldest son for life, and after his decease to his heirs male and female; and directed that in case the accumulated fund should not be sufficient for the payment of the legacies to the younger children, the said lands, together with certain other lands which were not the subject of the power, should stand charged with the deficiency:—*Held*, that the devise to the eldest son in fee in remainder was a good appointment under the power, although the gift to the wife was void. *Crosier v. Crosier.* 353

A testator devised lands, of which he was seised *pur autre vie*, to his nephew, *J. C.*, for life, and then proceeded thus:—"And from and after his decease, I give and devise the same unto the issue male and female of the said *J. C.* now begotten, or to be begotten, on the body of his present wife, to be divided between and amongst them in such manner, shares and proportions, as the said *J. C.* shall, by his last will, limit and appoint; subject, nevertheless, to the provisions hereinafter particularly mentioned, viz. that the said *J. C.*, his heirs, executors, administrators, and assigns, and the persons who shall become entitled thereto, under this my will, shall and will pay the head landlord's rent of the said lands, and

shall and will, yearly and every year, during the continuance of the lease, pay, or cause to be paid, to *S.*, his heirs or assigns, one yearly annuity or sum of 40*l.*, &c." *J. C.* did not duly exercise his power of appointment :—

*Held*, that *J. C.* took an estate for life only; and that his issue took absolute interests as tenants in common as purchasers; and that the words "issue male and female" meant sons and daughters, or the first line of issue. *Crozier v. Crozier.* 373

3. A testator, upon his marriage, covenanted to settle certain property, so as to secure a jointure of 400*l.* per annum for his wife. This covenant the testator never performed, but he directed the trustees of his will to pay the interest of 5000*l.* to his wife for her life, in addition to the provisions made for her by the marriage articles, and that 1000*l.* of said sum should be paid to such person as his said wife should by deed or will direct. There were several other legacies bequeathed by the testator. The 1000*l.* was paid to the widow during her life, but no portion of the interest, which accrued upon the balance of 4000*l.*, in consequence of the widow's claim, under the covenant in the marriage articles, having exhausted the whole fund properly applicable for that purpose. Upon the widow's death, her personal representative claimed the

arrears of interest out of the corpus of the fund, which was insufficient to pay all the legacies bequeathed by the testator :—*Held*, upon the true construction of the will, that the interest was given to the wife in priority to the other legacies, and that her personal representative was entitled to be paid the arrears of interest. *Pepper v. Bloomfield.* 499

4. A testator seised of an estate *pur auter vie*, and possessed of personal property to the amount of about 4500*l.* by his will bequeathed "the sum of 1500*l.*, the other part of the 4500*l.*, together with any further property," in trust for the use of his father, to be disposed of by him, share and share alike, as he by deed or will should appoint, among testator's brothers, *H.* and *J.*, and the daughter or daughters of his sister *E.* The will contained a residuary clause in these words: "as to the rest, residue, and remainder of my worldly estate and fortune, not heretofore and hereby disposed of, in trust to the use of my affectionate father, *J. C.*, and his heirs, executors, and administrators for ever :—"

*Held*, that the estate *pur auter vie* passed under the residuary clause, and not under the words "any further property," upon the construction of the whole will.

*E.* had several daughters :—*Held*, that the testator's father took a life interest in the "1500*l.*, together

with any further property," and that on his decease without having executed his power of appointment, *H. J.*, and each of the daughters of *E.*, were entitled to equal shares.

A testator seised under a lease *pur autre vie*, devised the lease upon certain trusts; upon the determination of the lease, the trustee of the will obtained a new lease, which

comprised the premises in the original lease, together with additional lands:—*Held*, that the trusts of the will did not attach upon the additional lands. *Acheson v. Fair*. 512

WITNESS.

*See* EVIDENCE.













